

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

\* \* \* \* \*

WISCONSIN RESOURCES PROTECTION  
COUNCIL, CENTER FOR BIOLOGICAL  
DIVERSITY and LAURA GAUGER,

Plaintiffs,  
-vs-

Case No. 11-CV-45-BBC

FLAMBEAU MINING COMPANY, INC., Madison, Wisconsin  
May 21, 2012  
Defendant. 9:00 a.m.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF FIRST DAY OF COURT TRIAL  
MORNING SESSION  
HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB,

APPEARANCES:

For the Plaintiffs: McGillivay, Westerberg & Bender  
BY: ATTORNEYS PAMELA MCGILLIVAY,  
JAMES SAUL and DAVID BENDER  
211 South Paterson Street, Ste. 320  
Madison, Wisconsin 53703

Pacific Environmental Advocacy  
Center - East  
BY: ATTORNEY KEVIN CASSIDY  
P.O. Box 445  
Norwell, Massachusetts 02061

Pacific Environmental Advocacy  
Center - West  
BY: ATTORNEY DANIEL MENSHER  
10015 SW Terwilliger Blvd.  
Portland, Oregon 97219

Lynette Swenson RMR, CRR, CBC  
Federal Court Reporter  
U.S. District Court 120 N. Henry St., Rm. 520  
Madison, WI 53703 (608) 255-3821

1 For the Plaintiffs: Center for Biological Diversity  
 2 BY: ATTORNEY MARC FINK  
 209 East Seventh Street  
 Duluth, Minnesota 55805

3 For the Defendant: DeWitt Ross & Stevens, S.C.  
 4 BY: ATTORNEYS HARRY VAN CAMP  
 and SCOTT PALER  
 5 Two East Mifflin Street, Ste. 600  
 Madison, Wisconsin 53703

6 Susan George - Paralegal

7 For the State Wisconsin Department of Justice  
 8 of Wisconsin: BY: AAG THOMAS J. DAWSON  
 17 West Main Street  
 9 Madison, Wisconsin 53703

10 Also present: Fred Fox

11 \* \* \* \* \*

12 **I-N-D-E-X**

13 <u>PLAINTIFFS' WITNESSES</u>	<u>EXAMINATION</u>	<u>PAGES</u>
14 DR. JOHN COLEMAN	Direct by Ms. McGillivay	32-80
	Cross by Mr. Van Camp	80-118

16 **E-X-H-I-B-I-T-S**

17 <u>EXHIBITS</u>	<u>IDENTIFIED/RECEIVED</u>
18 Exhibit 11 Photo - culvert	53 66
12 12 Photo - CPL	74 75
19 15 Photo - CPL	75 76
16 16 Photo - CPL	77 77
20 74 Photo - biofilter	63 ---
76 Photo - biofilter	64 71
21 80 Photo - biofilter	69 71
81 Photo - biofilter	70 71
22 82 Photo - Stream C	72 73
1002 Work Plan	43 66
23 1015 Figure-Work Plan	46 66
1016 Figures	43 66
24 1024 Figures	54 66
Requests for Admissions: (Received)	34, 56, 284, 473,
25 479, 481, 485, 489, 493, 495, 497, 508 and 528	

1 (Call to order)

2 THE CLERK: Case Number 11-CV-45-BBC.  
3 *Wisconsin Resources Protection Council, et al. v.*  
4 *Flambeau Mining Company* is called for court trial. May  
5 we have the appearances, please.

6 MS. MCGILLIVAY: Good morning, Your Honor. On  
7 behalf of Wisconsin Resources Protection Council, The  
8 Center for Biological Diversity and Laura Gauger, I'm  
9 Pam McGillivay. With me is David Bender and James Saul  
10 of McGillivray, Westerberg & Bender. Also with me is  
11 Kevin Cassidy of the Pacific Environmental Advocacy  
12 Center at the Lewis & Clark Law School. Also with us  
13 today are co-counsel Dan Mensher and our law clerk Liz  
14 Brumfeld, also from the Lewis & Clark Law School. And  
15 co-counsel Marc Fink from The Center of Biological  
16 Diversity. And with us is Laura Gauger, plaintiff and a  
17 member of CBD and WRPC.

18 THE COURT: Thank you. If you would just  
19 remember to stay seated in the future. I know it's hard  
20 not to stand up; that you have drilled into you the fact  
21 that you should be standing when you're in court. But  
22 we ask you to stay seated, use the microphone because we  
23 have streaming audio throughout the courthouse and there  
24 are a lot of interested people.

25 Mr. Van Camp.

1 MR. VAN CAMP: That's nearly impossible, Your  
2 Honor.

3 THE COURT: You can do it.

4 MR. VAN CAMP: I will try to remain seated. It  
5 has -- I've had many years of standing at every  
6 opportunity. So good morning, Your Honor. My name is  
7 Harry Van Camp and I represent the defendant in this  
8 case, Flambeau Mining Company. Flambeau is represented  
9 by Mr. Fred Fox. And also from DeWitt Ross and Stevens,  
10 representing Flambeau Mining Company, is Attorney Scott  
11 Paler. And we're assisted by Susan George.

12 I would also like to note that Attorney Tom Dawson  
13 is here representing the State.

14 THE COURT: Thank you.

15 MR. DAWSON: May I address the Court?

16 THE COURT: You may.

17 MR. DAWSON: Should I come to the microphone?

18 THE COURT: Sure.

19 MR. DAWSON: I'm Assistant Attorney General  
20 Thomas Dawson. I'm here solely for the purpose of  
21 representing the Department of Natural Resources  
22 witnesses who have been called in this case. I don't  
23 envision an active role here; however, if there is an  
24 issue such as the attorney/client privilege that may  
25 come up, I may want to object. But I am hoping that my

1 involvement in this case will be minimal.

2 THE COURT: Okay. Thank you.

3 MR. DAWSON: Thank you.

4 THE COURT: All right. Now Ms. McGillivay and  
5 Mr. Van Camp, do you wish to make any kind of opening  
6 statements? You certainly don't need to, but if there's  
7 something you want to say before you start, that's fine.

8 MS. MCGILLIVAY: Your Honor, we have a few  
9 preliminary matters. First, if you don't -- by your  
10 leave, since we filed a motion on -- to supplement our  
11 exhibit list on Friday, late in the day on Friday, we've  
12 had an opportunity to discuss that motion with defense  
13 counsel and we've reached a stipulation as to those late  
14 identified exhibits, that they would be stipulated to as  
15 admissible into evidence in exchange for defendant's  
16 exhibits, some other photographs which are Exhibits No.  
17 633 to 641, which we've also stipulated to admissibility  
18 on.

19 THE COURT: All right.

20 MS. MCGILLIVAY: And one other -- I guess a  
21 couple other matters, Your Honor. When defendants  
22 refiled their exhibit lists on the 16th, the numbering  
23 was off one for most of the exhibit numbers, so our  
24 objections that we filed on the 15th are off by one up  
25 to a certain number. Does the Court prefer us to refile

1 our objections or just go with our objections as we read  
2 them --

3 THE COURT: I'll try to adjust.

4 MS. MCGILLIVAY: Okay. And we also would like  
5 to move in the stipulated facts into the trial record  
6 that were filed by the parties in the pretrial statement  
7 and we would like the Court's guidance on two matters.

8 The first is we have Requests for Admissions, 13 of  
9 them, that we would like entered into the trial record  
10 and would ask for guidance whether you would like us to  
11 have those read into the record or just to identify the  
12 numbers that we'd like moved into evidence?

13 THE COURT: Okay. First of all, I assume  
14 there's no objection to the stipulation of facts being  
15 part of the record.

16 MR. VAN CAMP: Correct.

17 THE COURT: Okay. Then as to the admissions,  
18 is there any objection to those admissions?

19 MR. VAN CAMP: No, there's not an objection,  
20 but I do believe that it might be helpful if they're  
21 read into the record simply so that at the point in time  
22 that they are material, they become a part of the record  
23 rather than being extraneous.

24 THE COURT: Would you be willing to do that,  
25 just read them in as they become relevant? Or I assume

1 you wanted to put them all in as a group right away.

2 MS. MCGILLIVAY: Yes. They're -- because of  
3 the stipulations, they don't actually flow in a concise  
4 way. So I guess what we thought we would do is read  
5 them into the record, either all at once at the  
6 beginning of the trial or at the end.

7 THE COURT: Why don't we do it this way: I'll  
8 assume they're all part of the record. If at any point  
9 you think it would be helpful to the flow of your  
10 narrative or your questioning if you want to read in an  
11 admission at that point, go ahead.

12 MS. MCGILLIVAY: Okay. Thank you. And Your  
13 Honor, one further matter and that is the plaintiffs  
14 have designated portions of the deposition transcripts  
15 of defendant's expert Elizabeth Day. We've talked to  
16 defendant's counsel about taking Ms. Day out of order so  
17 that the Court would have the full context of her  
18 testimony prior to us closing our case-in-chief. I  
19 believe that the defendants would prefer us to have our  
20 snippets from those depositions read in first and then  
21 close our case. But we'd like the Court's guidance on  
22 that matter.

23 THE COURT: Well, she's not available for trial  
24 at all, is she?

25 MS. MCGILLIVAY: That's correct, she is only by

1 video deposition.

2 THE COURT: So the question is whether you'd be  
3 putting in her entire videotape deposition.

4 MS. MCGILLIVAY: Plaintiffs are not moving in  
5 the entire videotape deposition. Defendant's counsel  
6 has designated the entire transcript. But there are two  
7 transcripts. Plaintiff had designated portions of an  
8 earlier transcript as well and they're -- both in their  
9 designations and counterdesignations.

10 THE COURT: So you want to put in the earlier  
11 deposition portions that you had marked --

12 MS. MCGILLIVAY: Correct.

13 THE COURT: -- as part of your case-in-chief,  
14 and you also want to put in some parts of the deposition  
15 that she gave more recently.

16 MS. MCGILLIVAY: That's correct.

17 THE COURT: During your case.

18 MS. MCGILLIVAY: That's correct.

19 THE COURT: That would be all right with me.

20 And Mr. Van Camp, after you've put in those portions of  
21 the deposition, we can argue about whether you want any  
22 other portions for the sake of completeness or if you  
23 want to set it off and do the whole thing as part of  
24 your case.

25 MR. VAN CAMP: Okay.



1 MS. MCGILLIVAY: I think we'll introduce those  
2 at the end of our live witnesses.

3 THE COURT: Okay.

4 MS. MCGILLIVAY: And with that, James Saul is  
5 prepared to give a short opening statement.

6 THE COURT: All right.

7 MR. VAN CAMP: May I address one of the issues  
8 that was just discussed?

9 THE COURT: Oh, sure.

10 MR. VAN CAMP: There are literally hundreds of  
11 admissions or Requests for Admissions in this case and  
12 it would be, I think, helpful for the record if a single  
13 exhibit was admitted that had the admissions that were  
14 -- that are being moved in by the plaintiffs, and if  
15 they're willing to do that, if we can just consolidate  
16 that into one short exhibit.

17 THE COURT: That would probably be very  
18 helpful.

19 MR. VAN CAMP: I would certainly stipulate.

20 THE COURT: It doesn't have to be today that  
21 you do that.

22 MS. MCGILLIVAY: Your Honor, I'm prepared to  
23 just list off the numbers right now if that would make  
24 it easier, just to make it complete on this record, or  
25 if you prefer a separate filing, we can do that as well.

1 THE COURT: Well, if you want to put in the  
2 numbers, I'll take the numbers now and then you'll put  
3 in an exhibit that will include all of the admissions  
4 that correspond to those numbers?

5 MS. MCGILLIVAY: Yes. So defendants will have  
6 this information as well. The numbers that we will be  
7 moving into the record are No. 34, 56, 284, 473, 479,  
8 481, 485, 489, 493, 495, 497, 508, and 528.

9 THE COURT: All right.

10 MS. MCGILLIVAY: Thank you.

11 THE COURT: Anything else then, Mr. Van Camp?

12 MR. VAN CAMP: No, I think that's all. Thank  
13 you.

14 THE COURT: Then Mr. Saul.

15 MR. SAUL: Thank you, Your Honor. Your Honor,  
16 this case boils down to--

17 THE COURT: If you want to, you can use the  
18 lecturn if you'd prefer that. Whichever is more  
19 comfortable.

20 MR. SAUL: It is. Thank you.

21 THE COURT: And I should say Mr. Van Camp, you  
22 can stand up any time if you use the lectern.

23 MR. VAN CAMP: Thank you very much.

24 THE COURT: If that makes you feel better.

25 MR. VAN CAMP: Thank you.

1 MR. SAUL: Your Honor, this case boils down to  
2 20 feet. That is the distance from the biofilter berm  
3 to the channel of the waterway that defendant has long  
4 identified as *Intermittent Stream C*.

5 As will become apparent over the next several days,  
6 this intermittent stream channel provides a conveyance  
7 of polluted stormwater and a chemical, physical and  
8 biological nexus between those waters and wetlands  
9 upstream of Copper Park Lane and Stream C and the  
10 Flambeau River below Copper Park Lane. Plaintiffs will  
11 prove defendant's Clean Water Act liability under  
12 several overlapping but independent theories.

13 First, plaintiffs will show that defendant's  
14 biofilter discharges flowed through that narrow strip of  
15 wetland identified as Wetland 7 into the channel of  
16 Intermittent Stream C and into that portion of Stream C  
17 south of Copper Park Lane that the Court has already  
18 found to be a water of the United States.

19 This discharge and flow path has been observed on a  
20 number of indications by eyewitnesses who will testify  
21 today and tomorrow. Defendant has admitted this flow  
22 path for over a decade in almost every conceivable form,  
23 include permit applications, annual reports,  
24 communications with members of the public, internal  
25 memoranda to and from contractors, and private email

1 messages.

2       Testimony from plaintiffs' retained hydrologist,  
3 Robert Nauta, will confirm that polluted discharges from  
4 the biofilter travel the short flow path from the  
5 biofilter to Stream C, south of Copper Park Lane,  
6 thereby establishing liability.

7       Plaintiffs will also show that the waterway north  
8 of Copper Park Lane is itself a water of the United  
9 States for three reasons. The first is that the stream  
10 north of Copper Park Lane is a natural extension of  
11 Stream C, south of Copper Park Lane, and is  
12 jurisdictional for the same reasons that the Court found  
13 Lower Stream C to be jurisdictional. It is a tributary  
14 to the Flambeau River. It has defined bed and banks,  
15 seasonal flow, and delivers both water and pollutants to  
16 the Flambeau River.

17       Next plaintiffs will show that Wetland 7 is  
18 adjacent to Stream C because it has a continuous surface  
19 connection with the stream. That connection is provided  
20 by the culvert underneath Copper Park Lane, which  
21 enables flow to pass under the lane and into Lower  
22 Stream C. As argued by plaintiffs in our trial brief,  
23 that adjacency pulls Wetland 7 into the scope of the  
24 significant nexus determination the Court has already  
25 made.

1 And finally, plaintiffs will prove that Wetland 7,  
2 alone and in combination with other wetlands and  
3 drainage ways in the Stream C watershed, affects the  
4 physical, chemical and biological characteristics of  
5 Stream C and the Flambeau River such that even if the  
6 discharges from the biofilter were able to overcome the  
7 pull of gravity and get no further than Wetland 7,  
8 liability would still be established.

9 Testimony from several witnesses will show that  
10 Wetland 7, much like Intermittent Stream C, contributes  
11 both water and pollutants to Stream C and the Flambeau  
12 River creating both a physical and chemical nexus.

13 Testimony from other witnesses will establish the  
14 biological relationships between the wetlands and the  
15 Stream C watershed, including Wetland 7, Stream C, and  
16 the Flambeau River through the delivery of various  
17 constituents that affect the health and composition of  
18 aquatic life in Stream C.

19 Over the next several days, defendant's Clean Water  
20 Act liability will become crystal clear. Thank you.

21 THE COURT: Thank you. Mr. Van Camp, did you  
22 want to say anything?

23 MR. VAN CAMP: Yes, I will. Thank you. Good  
24 morning, Your Honor. Counsel. It is absolutely an  
25 honor for me to represent Flambeau Mining Company before

1 this court in this case. What's begun here today is a  
2 search for what has happened in a very, very small  
3 wetland at the Flambeau Mining site.

4 Before I address that particular wetland and the  
5 facts that will be proven, I'd like to give the Court a  
6 short few-minute background of the facts that led  
7 Flambeau Mining Company to the defendant's table in this  
8 courtroom. When Flambeau Mining Company came to the  
9 State of Wisconsin, they came to mine central metals,  
10 metals that are used by every one of us every day all  
11 the time. Copper. Zinc. Metals that we rely on for  
12 various activities: The wiring in our home, and so  
13 forth.

14 But they also came to the State of Wisconsin to be  
15 a good partner. They came to the State of Wisconsin to  
16 be a good neighbor. And as the evidence will  
17 demonstrate throughout this trial, it was their effort  
18 to be a good neighbor that has brought them into this  
19 courtroom. Flambeau understood before they came to the  
20 State of Wisconsin that Wisconsin was a very carefully  
21 regulated state. The citizens of the State of Wisconsin  
22 were very concerned about their environment. Flambeau  
23 Mining Company knew, when it came to the State of  
24 Wisconsin, that a concerned, capable, vigilant  
25 regulatory agency, the Wisconsin DNR, would carefully

1 monitor their activities.

2       You will hear in this trial testimony from many  
3 WDNR employees who did, in fact, vigilantly oversight or  
4 did vigilant oversight for this mining operation. They  
5 received permits. Flambeau Mining Company originally  
6 received permits of many kinds: Air permits, water  
7 permits, discharge permits, mining permits, and so  
8 forth.

9       The evidence in this case will show that they did  
10 not violate those permits. It's interesting that this  
11 case is not a dispute in a highly regulated state  
12 between the regulated and the regulator. They're on the  
13 same side in this case. The facts that they will  
14 present to this Court will be the same.

15       From the beginning, Flambeau Mining Company has  
16 complied with the stringent requirements of its permits.  
17 If and when minor problems were identified, they were  
18 addressed readily by FMC. They were fixed. This is  
19 true both during the mining operation and reclamation.

20       FMC was a good neighbor. The plaintiff in this  
21 case is not a local community. The plaintiff in this  
22 case is not a local citizen. This is not a case about  
23 local complaints where the evidence will show that there  
24 are problems with the local water or resources. In  
25 fact, the community witnesses in this case will testify

1 about how Flambeau Mining Company helped the community,  
2 how they provided good high paying jobs, provided money  
3 for local schools, libraries, fire departments, and  
4 recreation.

5 Interestingly, Your Honor, the only truly local  
6 witness who has an interest in the outcome of this case  
7 will be testifying in this case as a result of a  
8 subpoena sent to them by Flambeau Mining Company. This  
9 is Mr. Harold Flater. Mr. Harold Flater signed an  
10 affidavit or a declaration for standing in this case. I  
11 think the evidence will show that he didn't have  
12 personal knowledge about the matters in that, but he did  
13 absolutely have personal knowledge about some matters  
14 very relevant to this case.

15 He is a resort owner. He owns a resort on the  
16 Flambeau River at the confluence of the Flambeau River  
17 and the Chippewa River. He has lived there for 70  
18 years. That resort is just downstream from the Flambeau  
19 Mine site. And what he will tell you is he has been  
20 fishing on that river all his life. He will tell you  
21 that the river has been cleaned up and that fishing  
22 today is as good as it was in the 40s. He's very proud  
23 of the Flambeau River and the fishing that he provides  
24 for both himself, his friends and his clients.

25 What the facts will show or will not show is any



1 local damage. There will be no evidence of any local  
2 damage whatsoever. Plaintiffs will not be able to show  
3 any damage to any living things, from micro or  
4 macroinvertebrates, to fish, to birds, to amphibians,  
5 nothing. In fact, the plaintiffs hired no experts in  
6 this case to demonstrate damage. They have no witnesses  
7 that they will present to demonstrate any damage  
8 whatsoever.

9 Even though Flambeau doesn't have the burden of  
10 proof in this case, it will prove the opposite. It did  
11 hire experts to examine the situation, both biological  
12 and chemical, and determine that no damage occurred. So  
13 if Flambeau was a good neighbor --

14 THE COURT: Excuse me, Mr. Van Camp. You will  
15 have the burden of proof because those things go to  
16 mitigation, whether there should be a large fine or a  
17 small fine or any fine at all.

18 MR. VAN CAMP: You're absolutely correct. I  
19 was thinking about the liability phase and we're not  
20 going to present those witnesses in the liability phase  
21 and so I retract that; that we will have the burden of  
22 proof and we will demonstrate through experts that, in  
23 fact, there was no damage to any sort of biota or  
24 anything.

25 If this is the case, why is Flambeau here in this

1 courtroom as a defendant? Flambeau is here because they  
2 desperately tried and worked hard at being a good  
3 neighbor to the Ladysmith community. It was Flambeau's  
4 willingness to modify their original Reclamation Plan in  
5 order to contribute to the community that brought about  
6 the problems that we're here in this court to decide.

7 In the original Reclamation Plan, the entire mine  
8 site was going to be reclaimed. It would once again  
9 become forests, wetlands, prairies, trails, and so  
10 forth. There would be no buildings that they used for  
11 the mining operations remaining.

12 Before I get into the agreement that was reached  
13 between the community, environmental interests, the DNR,  
14 and Flambeau Mining Company, I'd like to draw the  
15 Court's attention to three photographs that I think at  
16 least demonstrate where we've come since they began  
17 their mining operations. Can you pull up 633. Can you  
18 see this over here?

19 THE COURT: It's just as good on the screen,  
20 but yes, I can see it.

21 MR. VAN CAMP: The photograph in Exhibit 633 is  
22 a photograph, an aerial photograph of the area that  
23 became the Flambeau Mine site just south of Ladysmith.  
24 The highway that you see crossing the lower left-hand  
25 corner of the photograph is Highway 27. As it goes up

1 in this photograph, it's headed directly south, and what  
2 you see in the upper left-hand corner and then winding  
3 across the top of the photograph is the Flambeau River.  
4 This is the way the location of the Flambeau Mine site  
5 appeared before mining began.

6 Can we go to 634. Exhibit 634 is a photograph,  
7 once again an aerial photograph. Once again, you can  
8 see Highway 27 crossing the lower left-hand corner of  
9 that photograph. This is looking essentially south,  
10 probably south and slightly west. You can see the  
11 Flambeau River at the top of the picture and you can see  
12 the mining pit where the incredibly rich ores were mined  
13 and removed by Flambeau Mining Company.

14 During mining operations, the ore was not processed  
15 at this location, it was taken by rail. And the rail  
16 spur is right under the buildings at the upper left-hand  
17 corner. And the rail cars you can actually -- I don't  
18 know if you can actually see them in the photograph  
19 before you, but there are rail cars that were loaded  
20 with ore and I think taken to Canada for processing.

21 Above that, just before the property turns to woods  
22 again, are some buildings, and those buildings were the  
23 buildings utilized by Flambeau Mining Company for the  
24 operation of the Flambeau mine. I will -- I think I can  
25 draw on this. Is there a red circle? Okay.

1 THE COURT: Um-hmm.

2 MR. VAN CAMP: I've put a red circle around  
3 what was a surge pond during the mining operation, and  
4 that surge pond collected runoff and wastewater from the  
5 mining operation and then it piped it back to the  
6 furthest building on the right, which was a water  
7 treatment facility.

8 So during the mining operation when there was a  
9 PDES permit, Flambeau Mine had a permit to discharge  
10 water after it was treated at the treatment plant  
11 directly into the Flambeau River. And as the evidence  
12 will show, the copper and so forth that could be  
13 discharged pursuant to that PDES permit far exceeded  
14 anything that is at issue in this case.

15 It is those buildings and the area where that surge  
16 pond is located that are at issue in this case. And as  
17 you'll see in the next photograph, the rest of that  
18 site, the entire site was reclaimed after the mining  
19 operation was completed.

20 THE COURT: And that -- the mine was in  
21 operation what, five years? Four years?

22 MR. VAN CAMP: Right. In the '93-'96, -7  
23 period.

24 THE COURT: And that was sufficient to take out  
25 all of the ore that was available?

1 MR. VAN CAMP: Well, I think there is probably  
2 some more ore there. That was the plan. This was the  
3 size of the site. That was plenty of time to remove the  
4 ore that they intended to remove and that was permitted  
5 for removal.

6 635 is a photograph, again an aerial photograph,  
7 taken of the Flambeau mining site, again just south of  
8 Ladysmith. For reference, Ladysmith would be a mile or  
9 so off to the lower right-hand corner. Again, you can  
10 see the Flambeau Mining Company -- I'm sorry, the  
11 Flambeau River crossing the upper right-hand part of the  
12 photograph. And the area that is at issue in this case,  
13 even on the photograph that is -- the large photograph  
14 that I have on the easel, I can literally cover the area  
15 with my finger. And because my -- oops -- because my  
16 finger is a little too large for the photograph, I'm  
17 going to show you on this larger photograph where it is  
18 that I'm looking. (Indicating)

19 I will -- now I'm going to draw a circle around the  
20 area that basically has become known as the Industrial  
21 Outlot and discuss that. (Indicating) It's not on the  
22 photograph, but it should be on your screen. Again, a  
23 red circle that shows the Industrial Outlot.

24 As mining operations were coming to a close and the  
25 plans and so forth for the reclamation were beginning,

1 the local Ladysmith community recognized there were some  
2 valuable buildings in the area that had been used or  
3 were at the time being used by the mine, and the  
4 community approached Flambeau Mining Company requesting  
5 the use of those buildings, asking them not to tear  
6 those buildings down and instead leave them so that they  
7 could be used as an Industrial Outlot for future  
8 development.

9       It was, in fact, to become and did, in fact, become  
10 a source of local revenue. It is rented, I believe, for  
11 \$10 a year by the Flambeau Mining Company to a  
12 development corporation, which then rents it out. One  
13 of the major tenants -- if you look at those buildings,  
14 one the major tenants in one of the significant  
15 buildings on that property is the DNR. And I think  
16 that's important because I think it demonstrates not  
17 only the openness that Flambeau Mining Company operated  
18 under during the mining operation, but also the openness  
19 with which they operate even today.

20       Originally when the Plan was modified in order to  
21 allow these buildings to be used by the local community  
22 for an industrial park, the water treatment plant was  
23 going to be retained so that there would be a plant  
24 through which any water treatment that was required  
25 could be done. For some reason, the plaintiffs in this

1 case, Laura Gauger, members of the WRPC, didn't want  
2 that water treatment facility to remain. They went to  
3 hearings about the modification; that is, the  
4 modification that would allow this property to be used  
5 by the local community, and they objected to the  
6 retention of that water treatment facility.

7 In an agreement that was reached between the  
8 community, environmental interests, the DNR, and  
9 Flambeau Mining Company, the water treatment plant --  
10 the building was retained so that they could use it, but  
11 all of the water treatment facilities were plugged up  
12 and removed.

13 Water treatment then for runoff was shifted under a  
14 plan approved by the DNR to a biofilter system. And you  
15 can see on Photograph 635 there is a dark square in the  
16 upper left-hand portion of that area and that's the .9  
17 acre biofilter.

18 Now, the only thing directed to that would be the  
19 stormwater runoff from the Industrial Outlot, from the  
20 roofs of the buildings there, from the parking lots of  
21 the buildings, and from the area around there, a few  
22 ditches and so forth. Those were to go into the  
23 biofilter. The biofilter was intended to allow anything  
24 in the water that went in there to drain to the bottom  
25 or to settle. And then on occasion in very heavy rains

1 or snow melt situations, there would be a little bit of  
2 a discharge.

3 Stormwater management, the DNR indicated, would be  
4 handled under the mining permit. As the evidence will  
5 show, the mining permit issued was more stringent than a  
6 PDES permit would have been. The DNR elected to do it  
7 under the mining permit because they had more resources  
8 to monitor it and because they had a more powerful tool  
9 to regulate it. Flambeau complied. There were some  
10 concerns that arose after the area was designated as an  
11 Industrial Outlot, and as each of those concerns of a  
12 particular area or something indicated that there was  
13 more copper or zinc than they had anticipated, it was  
14 studied by both Flambeau and the mining company,  
15 discussions were had, decisions were reached about what  
16 to do about it, and FMC then enhanced the reclamation  
17 they had already done by doing such things as removing a  
18 rail spur, taking all of the dirt out of ditches close  
19 to roads and replacing them, they paved the parking lots  
20 so that -- I mean after excavating, taking away  
21 materials in the parking lots. They put down crushed  
22 limestone. They put down asphalt and so forth to  
23 correct it.

24 The evidence that you will see in this case even  
25 presented by the plaintiffs in this case is that



1 throughout this period, as the DNR and as Flambeau  
2 learned, less and less and less stormwater runoff  
3 contributed copper or zinc to the biofilter.

4 Just momentarily I'd like to talk or just for a  
5 moment I'd like to talk about permits. By the time the  
6 modification that allowed the change from total  
7 reclamation of this property to the operation of the  
8 Industrial Outlot for the local community, DNR and  
9 Flambeau Mining Company had been working together for  
10 over ten years. After meetings and discussions, it was  
11 determined that the modification would be acceptable and  
12 that permits under the mining -- I mean permits that  
13 would involve wastewater treatment or runoff, stormwater  
14 runoff, would be handled under the DNR mining permit.

15 Throughout this time, WDNR was the agency in  
16 Wisconsin authorized to issue both mining permits and  
17 PDES permits. They were a fully delegated regulatory  
18 agency under the Clean Water Act. Flambeau Mining  
19 Company believed they had the permit for the stormwater  
20 runoff that they needed. WDNR still believes that.

21 Since there will be no evidence of harm, the WDNR  
22 employees that will testify will testify that the reason  
23 the mining permit was the better permit is because of  
24 staffing, regulatory authority, monitoring ability, and  
25 control.

1           The summary judgment order in this case determined  
2   that Flambeau had the wrong permit. It determined that  
3   Flambeau Mining Company needed a PDES permit if there's  
4   federal jurisdiction under the Clean Water Act. And  
5   what that comes down to is evidence in this trial of an  
6   infrequent discharge of a unknown amount of water, but  
7   at best very little. The discharge was infrequent. And  
8   the question becomes whether or not the wetland into  
9   which any of that discharge might have gone has a  
10   significant nexus to the Flambeau River. The Flambeau  
11   River is the closest traditional navigable water.

12           In the decision there will be two words: *nexus* and  
13   *significant*. The testimony in this case will  
14   demonstrate that out of thousands of days over many  
15   years, there were maybe a dozen or two overflows from  
16   the biofilter. There were less than ten observed by  
17   anybody from the plaintiffs and maybe two dozen observed  
18   by any witnesses in this case.

19           Flambeau Mining Company has been an open book.  
20   They are the ones that have done most of the monitoring.  
21   They have published their monitoring results to the DNR  
22   and to the public and to the plaintiffs. The DNR has  
23   done some testing and they have published their test  
24   results to Flambeau, to the plaintiffs, to the public.

25           The plaintiffs in this case retained two experts.

1 The two experts were retained to review the results from  
2 the samples that were taken by Flambeau Mining Company  
3 and the DNR. That's what they did; to determine the  
4 level of toxicity, and they will be able to testify  
5 about those samples. What they were not retained for,  
6 what they're not qualified for and what they will not be  
7 able to testify about is the connection between the  
8 biofilter, the wetland, Stream C, or the Flambeau River.  
9 Neither will they be able to identify any tests that  
10 they took to determine that; any measurements that they  
11 took to determine that; the volume of flow in any of  
12 these locations, whether it be between the biofilter and  
13 the wetland, the wetland and other parts of the wetland,  
14 the wetland and Stream C, whether it be above or below  
15 Copper Park Lane, and certainly the Flambeau River are  
16 unknown; the effect of the fact that Stream C is what's  
17 known as a *losing* or *declining* river, which you will  
18 hear testimony about, meaning that there are places in  
19 Stream C where there is flow and then it goes into  
20 groundwater where there is no flow and then reappears  
21 later as surface flow. There are no tests, there are no  
22 measurements, and there are no expert witnesses that can  
23 testify about the transport of anything from the  
24 biofilter of the wetland to Stream C or the Flambeau  
25 River. There are no dye tests that follow flow from one

1 place to another, and there are no other tests or  
2 studies that study that.

3 The plaintiffs won't be able to prove where the  
4 water in photographs you're looking at comes from or  
5 where it goes. Neither did the experts for the  
6 plaintiff do any groundwater level testing. So whether  
7 the water coming out of the biofilter infiltrates into  
8 the ground or whether groundwater percolates up and the  
9 effects of that are entirely unknown.

10 Neither are there any tests to determine the effect  
11 of this small wetland on anything. There are no tests  
12 conducted to determine whether it removes metals, adds  
13 metals, filters metals, does anything to them. Because  
14 the plaintiffs didn't hire experts to testify about  
15 this, I think they will put on evidence that is a  
16 smattering of observations over a few occasions by  
17 people who are probably qualified to do the tests that  
18 were never done. So they won't testify as scientists  
19 about tests that they performed and the results of tests  
20 and studies.

21 You will hear about dissolved oxygen and dissolved  
22 organic matter. And you will hear speculation about  
23 whether or not that dissolved oxygen or dissolved  
24 organic matter originated in this wetland. But nobody  
25 did any tests to determine whether the dissolved oxygen

1 in the wetland was the same or similar to the dissolved  
2 oxygen in Stream C south of Copper Park Lane.

3 The same goes for the dissolved organic matter.  
4 Nobody did any tests to determine whether that matter  
5 was the same.

6 You heard about Mr. Nauta and what he will testify  
7 to. He prepared his expert report before he ever went  
8 to the property. He took no samples. He studied the  
9 data about the toxicity and wrote a report.

10 You will hear from unretained experts called by the  
11 plaintiffs, Mr. Coleman and Mr. Roesler. They will tell  
12 you that on certain occasions they saw flow. Once  
13 again, significant is a key. This visual inspection  
14 occurred on very few days over very few years. There  
15 were no tests associated with those other than tests  
16 that were taken by Mr. Roesler related to a report on  
17 the quality of the water, and you will see that report  
18 and you will learn that the purpose of the report had  
19 nothing to do with determining a significant nexus, it  
20 had to do with determining the effects of toxicity. And  
21 even in his executive summary at the very beginning he  
22 will inform the Court that there was no apparent damage  
23 or harm caused by any of this.

24 Also Mr. Coleman -- Dr. Coleman, I'm sorry, viewed  
25 the same thing. You've seen it a number of times.

1 There apparently was some confusion at his deposition  
2 about what he would testify about, but he has visited  
3 the site. But many of the visits you will hear were  
4 prior to the five years preceding the filing of the  
5 complaint. And in addition, his observations were the  
6 type of observation that are not reliable because they  
7 aren't based on scientific evidence or tests.

8 Now I think I've run a little long. Rather than  
9 going through Mr. Roesler's report at this point in  
10 time, we will look at that, but I would ask you to look  
11 for it. It's Joint Exhibit 1028. It's called a *Surface*  
12 *Water Quality Assessment* done by Mr. Roesler in 2012.  
13 In that report, while he studies the toxicity and water  
14 quality and various things, he didn't study the wetland.  
15 He basically ignored the wetland. He did tests in the  
16 biofilter south of Copper Park Lane, but not in between.  
17 There is no study anyplace of the wetlands' effect on  
18 copper or zinc.

19 This Court is going to be charged with determining  
20 what was going on in that wetland. The evidence will  
21 not demonstrate that anything was going on because there  
22 isn't evidence about it, and as a result, the Court, I  
23 don't believe, will be able to determine that there is  
24 any nexus, much less a significant nexus, between the  
25 biofilter, the wetland, Stream C or the Flambeau River.

1 They didn't study those relationships.

2       Very briefly: If this Court proceeds to a penalty  
3 phase, I think the evidence will be overwhelmingly in  
4 Flambeau Mining Company's favor. There will be no  
5 evidence of harm. There will be evidence of a good  
6 neighbor. It's a beautiful facility. It provides  
7 recreation, equestrian facilities, hiking.

8       Flambeau has throughout been open with all its  
9 testing and operations. It has provided monitoring. It  
10 has provided remediation repeatedly. Where there have  
11 been problems found, it has corrected them. Up to now  
12 it has eliminated the discharges completely. There are  
13 infiltration basins, three of them. They're all  
14 oversized. They are all over the capacity required to  
15 handle any storm in Ladysmith's recorded area history.

16       Flambeau Mining Company has been a model partner  
17 for the State of Wisconsin. They have demonstrated  
18 repeatedly concern about the environmental interests for  
19 the State of Wisconsin. We believe that the testimony  
20 from the DNR will agree with that. And if there is any  
21 sort of penalty in this case, it should be minimal to  
22 reflect the truth about Flambeau's operations in the  
23 State of Wisconsin, Flambeau's efforts to protect  
24 Wisconsin's environment, and plaintiffs' efforts to be  
25 the good neighbor that brought them to this courtroom by

1 agreeing to change their Reclamation Plan to the  
2 Reclamation Plan that left those buildings for the  
3 people in Ladysmith. Thank you.

4 THE COURT: Thank you. Ms. McGillivay, you may  
5 call your first witness.

6 MS. MCGILLIVAY: Thank you, Your Honor.  
7 Plaintiffs call Dr. John Coleman.

8 **JOHN COLEMAN, PLAINTIFFS' WITNESS, SWORN,**

9 DIRECT EXAMINATION

10 BY MS. MCGILLIVAY:

11 Q Good morning, Dr. Coleman. Can you please state  
12 your full name.

13 A John Samuel Coleman.

14 Q And by whom are you currently employed?

15 A Great Lakes Indian Fish and Wildlife Commission.

16 Q Does that go by the acronym GLIFWC?

17 A Yes, it does.

18 Q And can you just describe generally what GLIFWC?

19 A GLIFWC is a natural resource agency. It has eleven  
20 member tribes, Chippewa tribes, in Michigan, Wisconsin  
21 and Minnesota. GLIFWC serves to assist those member  
22 tribes in monitoring and managing natural resources in  
23 what's called the *ceded territories* which are  
24 territories that were ceded to the U.S. government in  
25 1836, 1842, 1837 and 1854.

JOHN COLEMAN - DIRECT



1 Q Ceded by the tribes?

2 A Ceded by the tribes under a variety of treaties.

3 Q And what is your current position with GLIFWC?

4 A My current position is I'm the environmental  
5 section leader and I direct a small number of employees  
6 in the environmental section.

7 Q What does the environmental section do?

8 A The environmental section looks at environmental  
9 quality. We have a program looking at mercury  
10 contamination in a variety of tissues that are of  
11 interest to the tribes, particularly fish tissues. We  
12 have a mercury and other toxicants program; an employee  
13 working on that. We monitor environmental quality such  
14 as water quality; contaminants in plants and animals.  
15 We also review mine projects, significant mining in the  
16 region, particularly in Michigan and Minnesota. And we  
17 review mine projects looking at potential environmental  
18 impacts.

19 We are the section that works mostly with our  
20 member tribes that are -- we have some member tribes  
21 that are cooperating agencies on environmental impact  
22 statements for mining projects, and so the environmental  
23 section works with those member tribes to assist them on  
24 technical issues related to environmental impacts and  
25 proposed mining projects.

JOHN COLEMAN - DIRECT

1 Q How long have you had the position of environmental  
2 section leader at GLIFWC?

3 A I started working for GLIFWC in 1994 and I think it  
4 was in '96 or '97 that I became environmental section  
5 leader. My position did not change substantially at  
6 that point.

7 Q Let me refer you to your monitor and there should  
8 be an Exhibit 73 displayed.

9 A Yes.

10 Q And do you recognize that document?

11 A I do, although I may have to put on my glasses to  
12 read some of the print. But...

13 Q Do you have your glasses with you?

14 A I do. I think I can handle it at this point. I'll  
15 see.

16 Q Okay. Looking at this document, does it refresh  
17 your recollection when you became the --

18 A Environmental section leader?

19 Q Correct.

20 A Yeah.

21 Q I'll withdraw my question, Dr. Coleman, because it  
22 looks like you just have 1994 to present that you  
23 maintain this position.

24 A Yes.

25 Q Some time in the late 90s you switched over to the  
JOHN COLEMAN - DIRECT

1 environmental section?

2 A Leader, yes.

3 Q Okay.

4 A I acquired those additional responsibilities,  
5 running the section, as I say, though my day-to-day  
6 responsibilities did not change substantially.

7 Q Okay. Then let's move back in time to when you got  
8 your bachelor's degree. What is your bachelor's degree  
9 in?

10 A My bachelor's degree was in Wildlife Ecology at the  
11 University of Maine.

12 Q Okay. And you have a master's degree?

13 A I have a master's degree in Wildlife and Fishery  
14 Science from VPI and SU in Virginia.

15 Q In between your -- receiving your master's degree  
16 and your doctorate, did you have occasion to work  
17 professionally?

18 A I had one professional -- well, two jobs actually:  
19 one was working for the Florida Fish and Gaming  
20 Commission on the Kissimmee River looking at --  
21 Kissimmee River had been channelized by the Army Corps  
22 of Engineers and there was an effort to revitalize that  
23 river valley by redirecting water into abandoned river  
24 channels. And so we were doing studies of fish  
25 populations and vegetation as those channels were

JOHN COLEMAN - DIRECT

1 receiving fresh influxes of water from the redirected  
2 canal.

3 Also worked at a research lab in France for a short  
4 period of time looking at the use of molecular  
5 techniques to do wildlife research.

6 Q And when did you receive your doctorate?

7 A I received my doctorate from the University of  
8 Wisconsin and that would have been in 1994.

9 Q What do you hold a Ph.D. in?

10 A My Ph.D. is in Wildlife Science. I had a minor in  
11 Statistics.

12 Q Can you just briefly describe what wildlife  
13 science -- what the field is?

14 A It's a pretty broad field. Some of it involves --  
15 at this point there's -- in that department there's a  
16 significant toxicology aspect to that, to that field.  
17 Traditionally it's game management. Sometimes wildlife  
18 ecology can involve fisheries management. And so in the  
19 department, similar department in Virginia, they had a  
20 fisheries department. It's also often combined with  
21 forestry departments, so there's a significant  
22 vegetation management and manipulation aspect.

23 It can -- as I said, traditionally it's very much  
24 wildlife management, but has evolved to wildlife  
25 conservation and study, endangered species restoration,

JOHN COLEMAN - DIRECT

1 and a number of DNR employees have come through that  
2 department and they work in a variety of fields. The  
3 Mercury Program at the DNR is staffed partly by my  
4 graduates from that department.

5 Q Okay. Now I want to speak specifically to your  
6 experience professionally with the Flambeau Mining site.  
7 When did you first become involved with issues related  
8 to the Flambeau Mine?

9 A I would say that I was aware of the Flambeau Mine  
10 since the time of permitting, but I didn't become  
11 professionally involved until the time that the project  
12 came close to closure. In 1997/'98, I was asked to look  
13 at that project and look at the environmental data that  
14 was coming out of that project, and so I began reviewing  
15 reports and documents coming from the DNR and from the  
16 mining company.

17 Q When you say you were asked to look at the Flambeau  
18 Mining Company's reports, by whom were you working on --

19 A My employer. It became one of my tasks as part of  
20 my job.

21 Q Okay. And in your professional capacity, have you  
22 had occasion to visit the Flambeau Mine site?

23 A I have, on a number of occasions, I have visited  
24 the Flambeau Mine site, both on my own and in the  
25 company of the DNR and then once during a contested case

JOHN COLEMAN - DIRECT

1 field trip.

2 Q What do you mean by a *contested case field trip*?

3 A There was a certificate, I think it was a contested  
4 case, exactly the legal standing of that I'm not sure,  
5 but it was an application for a certificate of  
6 completion by Flambeau Mining Company and there was, I  
7 believe, what was a contested case related to that and  
8 there was a field trip with the parties and the hearing  
9 examiner to the mine site in 2007.

10 Q Okay. I'm going to direct you back to your  
11 monitor. Do you recall preparing a declaration for the  
12 plaintiffs in November of 2011 for this case?

13 A I do.

14 Q And what is on your monitor? Is this a copy of  
15 that declaration? I'll scroll down.

16 A It certainly looks like it. It's going by very  
17 quickly.

18 Q I just wanted to show you --

19 THE COURT: Don't look at it.

20 Q -- your signature.

21 A I may get sea sick here.

22 Q Is that your signature?

23 A Yes, that is my declaration.

24 Q Okay. I'm going to direct you to paragraph 6 of  
25 that declaration.

JOHN COLEMAN - DIRECT

1 A I have a hard copy here. It would be easier for me  
2 to look at this than the screen.

3 Q Okay. Thank you.

4 MR. VAN CAMP: Your Honor, may I approach just  
5 to look at the document the witness is looking at?

6 THE COURT: You may.

7 MR. VAN CAMP: I certainly don't object to this  
8 witness using a paper copy of the document, but this  
9 particular paper copy has changes and writings and  
10 things on it and unless it's going to be introduced and  
11 we're given copies of it, I don't believe it should be  
12 used.

13 THE COURT: I agree. You better get your  
14 glasses out.

15 THE WITNESS: Okay.

16 THE COURT: And if you're going to be scrolling  
17 through the document, give us advance warning so we can  
18 look away.

19 MS. MCGILLIVAY: Getting used to the  
20 technology, Your Honor. Your Honor, plaintiffs have no  
21 objection to marking Dr. Coleman's paper copy as an  
22 exhibit, if that's preferable.

23 MR. VAN CAMP: I don't have a copy. The Court  
24 doesn't have a copy. I guess I would prefer to have him  
25 testify either from -- I mean there are copies within

JOHN COLEMAN - DIRECT

1 the binders of documents, so they can provide him with a  
2 paper copy if they want.

3 THE COURT: I agree.

4 MS. MCGILLIVAY: Your Honor, may I approach  
5 with that paper copy?

6 THE COURT: You may.

7 MS. MCGILLIVAY: Your Honor, do you need a  
8 copy, too, or for the witness? I wasn't planning on --

9 THE COURT: I'll just look at the screen.

10 BY MS. MCGILLIVAY:

11 Q Okay. Dr. Coleman, looking at paragraph 6, you can  
12 review it to yourself. Does there refresh your  
13 recollection of what the agency proceeding was in 2007?

14 MR. VAN CAMP: Your Honor, I'm going to object  
15 to this form of question. Apparently she's trying to  
16 refresh the memory about something that hasn't yet been  
17 asked. Sorry.

18 THE COURT: You have to -- you have to set the  
19 framework for that.

20 MS. MCGILLIVAY: I'm sorry, Your Honor, I  
21 thought I had when --

22 BY MS. MCGILLIVAY:

23 Q Dr. Coleman, do you recall the certificate of  
24 completion of reclamation proceedings in 2007?

25 A Yes. In reading through paragraph 6, I don't see  
JOHN COLEMAN - DIRECT



1 that it is any different than what I said earlier  
2 related to the certificate of completion.

3 Q Is the certificate of completion of reclamation the  
4 agency proceeding that you were referring to?

5 A Yes, it is.

6 Q Okay. And did you file testimony on behalf of  
7 GLIFWC for that proceeding?

8 A Yes, we did.

9 Q In -- I'm going to back up to your visits to the  
10 mine site. Do you recall when your most recent visit  
11 was to the Flambeau Mine site?

12 A My most recent was in 2010.

13 Q Do you recall whether it was in June of 2010?

14 MR. VAN CAMP: Your Honor, I'm going to object  
15 to counsel leading the witness.

16 THE COURT: Sustained.

17 BY MS. MCGILLIVAY:

18 Q Do you recall when in 2010 the -- your most recent  
19 inspection took place?

20 A I believe it was in the spring of 2010, yes.

21 Q Okay. In your declaration, if you look to  
22 paragraph 7 --

23 THE COURT: You're asking him to refresh his  
24 recollection as to the month in which he visited?

25 MS. MCGILLIVAY: Correct, Your Honor.  
JOHN COLEMAN - DIRECT

1 Q Does that refresh your recollection the date of  
2 your most recent visit?

3 A Well, paragraph 8 makes it clear that it was June  
4 10th.

5 Q You said that you reviewed reports for the Flambeau  
6 Mine Company as part of your professional -- as part of  
7 your professional work; is that right?

8 A Yes.

9 Q Can you describe what type of reports that you  
10 reviewed?

11 A They're quite a variety. Probably the most  
12 extensive reports were annual reports produced by  
13 Flambeau Mining Company, but there are also reclamation  
14 reports. There are quarterly water quality reports.  
15 That probably covers most of it.

16 Q And are those the types of documents that you  
17 typically review in your professional work?

18 A Yes, they are, depending on the stage of the mining  
19 project that we're looking at or the industrial project  
20 that we're looking at, but those are fairly typical for  
21 an operating or closing mining project.

22 Q Are you familiar with the Copper Park Business and  
23 Recreation Area Work Plan report from May of 2011?

24 A I am familiar with it. I'm not intimately. I did  
25 not study that report as closely as some of the other

JOHN COLEMAN - DIRECT

1 reports that we've written -- written summary documents  
2 related to.

3 Q Is that a report that you reviewed as part of your  
4 professional work for GLIFWC?

5 A Yes, it is.

6 Q And I'm going to show you on your screen what has  
7 been marked as Exhibit 1002. It's 269 pages, so I won't  
8 scroll through it. But just going through the table of  
9 contents, is this the May 2011 Work Plan that you  
10 reviewed?

11 A Yes, it is.

12 Q Okay. And attached to, at least according to the  
13 table of contents, are a number of figures. Did you  
14 review the figures that were attached to this May 2011  
15 Work Plan?

16 A I reviewed at least the majority of those figures.

17 Q Okay. I'm going to turn to one of those figures  
18 which has been marked as Exhibit 1016. Do you recognize  
19 this figure as one of the documents from the May 2011  
20 Work Plan that you reviewed?

21 A Yes, I do. It's very similar to other figures  
22 generated for annual reports and other reports by  
23 Flambeau Mining Company.

24 Q Okay. Based on your familiarity with the Flambeau  
25 Mine sites from your prior visits, does the aerial

JOHN COLEMAN - DIRECT

1 photograph, the underlying aerial photograph, fairly and  
2 accurately depict the Flambeau Mine site?

3 A At this scale, I wouldn't want to talk about  
4 details, but at this scale, yes, it appears to.

5 Q And I want to talk to you about some of the bigger  
6 features on this figure. Are you familiar with this  
7 section, with the part I just indicated, what that  
8 represents? (Indicating)

9 A That line appears to be along Highway 27.

10 Q Okay. And this water body, is that --

11 A Yeah, is the Flambeau River.

12 THE COURT: If you want him to mark things, he  
13 can just do it with his finger on his screen.

14 BY MS. MCGILLIVAY:

15 Q Okay. Can you indicate where the Flambeau River is  
16 on Exhibit 1016?

17 A It's that -- is that working?

18 Q Yes. And how about are you familiar where Copper  
19 Park Lane is as it would appear on this figure?

20 A Yes. (Indicating)

21 Q I think you have to push a little harder.

22 A (Indicating)

23 Q Thank you. This section on this figure noted as  
24 the 0.9 acre biofilter, based on your indications where  
25 is the biofilter?

JOHN COLEMAN - DIRECT

1 A This square area right here. (Indicating)

2 Q And can you identify on this diagram where  
3 Intermittent Stream C is?

4 A Well, starting at the --

5 MR. VAN CAMP: Your Honor, I'm going to object  
6 to the form of the question. It needs to be a little  
7 more precise as we have determined so far --

8 THE COURT: Sustained.

9 MR. VAN CAMP: -- in this case.

10 THE COURT: Sustained.

11 BY MS. MCGILLIVAY:

12 Q Dr. Coleman, beginning south of Copper Park Lane,  
13 can you identify where Intermittent Stream C is on this  
14 diagram based on your observations of the Flambeau Mine  
15 site?

16 A I want to make sure I understand the question.  
17 Starting south of Copper Park Lane and going upstream or  
18 downstream?

19 Q Downstream.

20 A Okay. At Copper Park Lane, Intermittent Stream  
21 flows through the woods here and exits the Flambeau  
22 River next to another creek.

23 Q Okay. Before discussing this section south of  
24 Copper Park Lane, can you identify where the Industrial  
25 Outlot is on this figure?

JOHN COLEMAN - DIRECT

1 A The Industrial Outlot is this area enclosed and  
2 marked on the map which I have just outlined.

3 (Indicating)

4 Q And the marking then on the figure which is in  
5 orange is fairly accurately represented as the  
6 Industrial Outlot?

7 A I believe that to be the case.

8 Q I'm going to focus now on that Industrial Outlot  
9 section. Show you what's been marked as Exhibit 1015.

10 THE COURT: You can remove -- good.

11 Q Have you seen -- have you reviewed before today the  
12 exhibit that's been marked as 1015?

13 A Yes, I have.

14 Q Do you recognize it as a figure representing the  
15 Industrial Outlot?

16 A Yes.

17 Q And I'm going to focus further in on this section  
18 of the Industrial Outlot, the southeast corner of the  
19 Industrial Outlot. I think that there is another figure  
20 with just that section. If I show you Exhibit 1024, can  
21 you identify that figure?

22 A Could you repeat the question? With the changing  
23 of figures, I'm getting a little confused about --

24 Q Sure. I'm going to turn back to Exhibit 1015 and I  
25 want you to focus on the southeast corner of the

JOHN COLEMAN - DIRECT

1 Industrial Outlot.

2 A Yes.

3 Q I think there's a clearer figure that is marked as  
4 Exhibit 1024.

5 A Okay. So I see several different numbers here.  
6 You got me confused. 1024, yes.

7 Q Do you recognize this section of the Industrial  
8 Outlot?

9 A Yes, I do.

10 Q Okay. And have you seen this Figure 2 of the Foth  
11 Work Plan --

12 A Yes.

13 Q -- for today? So now I'd like to talk about the  
14 features that are on this figure. Starting with --  
15 starting with the section that is at Highway 27, can you  
16 identify -- have you observed culverts along this  
17 section during your visits?

18 MR. VAN CAMP: Objection. Leading.

19 THE COURT: Overruled.

20 THE WITNESS: Starting at Highway 27 did you  
21 say? At Highway 27, there's a culvert under the road.  
22 There's double culverts that go under what used to be  
23 the rail spur for the mine site. There's a small old  
24 rusted-out culvert here that I believe was called the  
25 *farm road culvert* during a visit and apparently was

JOHN COLEMAN - DIRECT

1 associated with an earlier farm, and there's a culvert  
2 under Copper Park Lane here.

3 BY MS. MCGILLIVAY:

4 Q Are your markings of those culverts on Figure 2  
5 based on your observation of those features during your  
6 site visits to the Flambeau Mine?

7 A Yes.

8 Q Starting with the culvert that you identified at  
9 Highway 27 and -- at Highway 27, can you describe what  
10 features are between that culvert and the culvert at the  
11 railroad corridor?

12 A This culvert at Highway 27, I believe, is a  
13 concrete culvert. It discharges into a small open pool  
14 at that corner between Highway 27 and the rail spur.  
15 That water then flows along a channel parallel with the  
16 rail spur. I believe that area was probably modified  
17 during mine construction, but then passes the water --  
18 then passes through the culverts under the rail spur  
19 where it exits on the south.

20 Q Okay. And so on the south side of the culvert  
21 under the railroad spur, could you mark what you're  
22 referring to?

23 A This area water exits right here from those  
24 culverts.

25 Q And then continue on, please, where -- and describe  
JOHN COLEMAN - DIRECT



1 the area between that south end of the culvert at the  
2 railroad spur to the farm road culvert.

3 A Well --

4 MR. VAN CAMP: Objection. Foundation.

5 THE COURT: Sustained.

6 BY MS. MCGILLIVAY:

7 Q Have you observed the area, the portion of the  
8 Industrial Outlot that lies between the culvert at the  
9 railroad corridor and the farm road culvert?

10 A Yes, I have.

11 Q Based on your observation, can you describe the  
12 features in that area?

13 A We're talking about this area between these  
14 culverts here (indicating) and down to the farm culvert,  
15 and in that area the --

16 THE COURT: I'm sorry, Dr. Coleman. I'm not  
17 sure which culvert you're talking about at this point.

18 BY MS. MCGILLIVAY:

19 Q Would you mark the culverts with maybe an "X," the  
20 railroad corridor?

21 THE COURT: You could change the color. That  
22 might be good.

23 Q There. Pink?

24 A Fuchsia.

25 Q Fuchsia.

JOHN COLEMAN - DIRECT

1 A I think the question you're asking me is about the  
2 culverts, they exit -- I'm going to put an "X" right  
3 there. Right at that point the culverts exit. And then  
4 the other culvert that you're talking about is down  
5 here, the old farm road culvert, and you're talking  
6 about the section in here. (Indicating) That is the  
7 section that is generally a grassy area. The stream has  
8 --

9 THE COURT: You're talking about the lower of  
10 the two X's that you put up? Is that what you're --

11 THE WITNESS: I'm talking about this entire  
12 area between the culverts under the rail spur and the  
13 culvert under the old farm road. So this area where the  
14 stream runs parallel to the biofilter.

15 THE COURT: I'm sorry, that's not going to work  
16 for the record. So if you're talking about the "X" at  
17 the top that you marked in, and I'm looking now at the  
18 -- if you assume that we're looking north, it would be  
19 at the northwest -- closest to the west -- the northwest  
20 corner. And then you come down and you put another "X"  
21 farther south. Is that the area you're talking about?

22 THE WITNESS: I'm not sure -- I'm not sure  
23 about your question. Northwest corner -- why don't we  
24 start over.

25 MS. MCGILLIVAY: Why don't I start with a clear  
JOHN COLEMAN - DIRECT

1 screen.

2 THE COURT: Let's clear the screen. That's a  
3 very good idea.

4 BY MS. MCGILLIVAY:

5 Q I'll ask you if you can identify -- and I think  
6 that you have a color change option on yours. Whatever  
7 color comes up, it's clear now. Can you identify where  
8 the south end of the railroad spur culvert is?

9 A Okay. Right here. (Indicating)

10 Q And where the culvert is at the old farm access  
11 road?

12 A (Witness indicates)

13 Q And can you describe the features between those two  
14 points?

15 A In this area between these two culverts the -- it's  
16 a grassy area. There's a gentle, relatively gentle  
17 swale that the stream passes along. It's not extremely  
18 channelized in that area, but there's a swale that the  
19 water flows along, a channel, and that area is maybe 100  
20 feet long, not terribly extensive. I'm not exactly  
21 sure, a grassy swale where the stream passes.

22 Q Okay. And have you personally observed water  
23 flowing between those two points that you've just  
24 indicated as the south end of the railroad corridor  
25 culvert and the farm access road culvert?

JOHN COLEMAN - DIRECT

1 MR. VAN CAMP: Objection. Leading.

2 THE COURT: Overruled.

3 THE WITNESS: I have observed water flowing in  
4 the stream in that area, yes.

5 BY MS. MCGILLIVAY:

6 Q To continue down along this waterway, starting at  
7 the farm access road culvert, can you identify where the  
8 culvert is at Copper Park Lane?

9 A That culvert is -- passes under Copper Park Lane in  
10 that area there. (Indicating)

11 Q And have you observed that area between the culvert  
12 at the farm access road and Copper Park Lane in your --

13 A Yes, I have.

14 Q Can you describe that section between the farm  
15 access road culvert and the Copper Park Lane culvert?

16 A On the stream channel, there's a stream channel  
17 there that's somewhat incised into the ground. There is  
18 -- it's also grassy in that area, but that stream  
19 channel has some bare rock and soil in that location.  
20 It's more incised, the stream is more incised in that  
21 section than it is farther about the farm culvert.

22 Q And have you personally observed water flowing  
23 between those two culverts?

24 A Yes, I have.

25 Q Okay.

JOHN COLEMAN - DIRECT

1 THE COURT: The lower two you're talking about.

2 MS. MCGILLIVAY: The lower two. Thank you.

3 THE WITNESS: Yes.

4 BY MS. MCGILLIVAY:

5 Q Have you personally observed each of the four  
6 culverts themselves?

7 A The four being -- there are actually five;  
8 including Highway 27, would be five. I think they're  
9 double culverts underneath the railroad spur. So yes, I  
10 have.

11 Q Thank you for that clarification. So what I wanted  
12 to ask you was whether you have observed each of the  
13 culverts: At Highway 27, at the railroad corridor, at  
14 the farm road, and at Copper Park Lane?

15 A Yes, I have.

16 Q And have you on occasion taken photos of the  
17 culverts?

18 A Of some of those culverts. I have many photos of  
19 the culvert under Copper Park Lane. I have -- yeah, the  
20 culverts I probably have photos of, too, but...

21 Q I'm going to direct you to your screen and show you  
22 what's been marked as Exhibit 11.

23 A Yes.

24 Q Is this a photograph that you took?

25 A Yes. This is a photograph of the culvert going  
JOHN COLEMAN - DIRECT

1 under Copper Park Lane. This is from the north side.

2 Q Okay. And why did you take this photograph?

3 A I was struck by the amount of corrosion on the  
4 bottom of the culvert.

5 Q What did you find that was interesting about  
6 corrosion of the culvert?

7 MR. VAN CAMP: Objection. Foundation.

8 THE COURT: Sustained.

9 BY MS. MCGILLIVAY:

10 Q What do you -- Dr. Coleman, what do you mean by  
11 corrosion at this culvert?

12 A I noticed that there was a lot of rust on the  
13 bottom of this culvert, and in fact, there's -- in this  
14 photo, you can see a little fountain of water coming up  
15 through one of the holes in the bottom of the culvert;  
16 that the culvert is rusted through on the bottom and the  
17 water from the stream appears to be getting underneath  
18 the culvert and then coming back up through the hole in  
19 the culvert.

20 I didn't think it was a big deal, but it looked a  
21 little curious to me that it had rusted through. I  
22 started wondering about the life of culverts, how long  
23 culverts last. I take photos of a lot of things and  
24 this struck me as a little more rusted than some  
25 culverts I had seen.

JOHN COLEMAN - DIRECT

1 Q In looking at this photograph, it appears as though  
2 those markings continue up above the water line.

3 MR. VAN CAMP: Objection. Leading.

4 THE COURT: Sustained.

5 BY MS. MCGILLIVAY:

6 Q Dr. Coleman, can you describe what the portion of  
7 the culvert -- the culvert above the water line?

8 A Well, I'll try to describe what I see in this  
9 photograph. There's the water flowing through the  
10 culvert, about two inches of water possibly. Further up  
11 on the side of the culvert it's moist. It appeared to  
12 me that the water had, not too long previously, had been  
13 a little bit higher. That's stained with a lot of rust.  
14 So it looked to me like there was -- that was kind of a  
15 level -- I'll mark it here -- a level where the water  
16 may come up to on a fairly regular basis. And then  
17 there's a higher water line that looked like a less  
18 frequent water level in that culvert.

19 MR. VAN CAMP: I'm going to move to strike.  
20 This witness hasn't been qualified as an expert in this  
21 area.

22 THE COURT: But he can certainly talk about  
23 what he saw. The objection is overruled.

24 BY MS. MCGILLIVAY:

25 Q Dr. Coleman, in your review of the other set -- the  
JOHN COLEMAN - DIRECT

1 other four culverts in the section of the Industrial  
2 Outlot that you identified in Exhibit 1024, did you  
3 witness any similar water markings on those culverts?

4 A There were water markings on those culverts. I  
5 would not articulate them as similar because I observed  
6 them much less often. I did notice the farm road  
7 culvert was a much older culvert. That culvert, when I  
8 saw it, I think that was in 2007, was pretty much rusted  
9 all the way through the bottom half of it. But it was  
10 an older culvert, so I wasn't particularly surprised.

11 The other culverts had water staining on them. The  
12 amount and extent of staining I wouldn't want to make  
13 any statement about.

14 Q Okay. I'm going to show you -- go back to Exhibit  
15 1024. Can you describe the biofilter basin?

16 A Biofilter basin. It looks like a square pond with  
17 cattails coming out of it.

18 Q All right. And are you familiar with the biofilter  
19 outlet?

20 A Yes, I am.

21 Q Can you describe the biofilter outlet?

22 A The biofilter outlet is maybe 15 feet across along  
23 the berm and extends from the biofilter to where it  
24 reaches the level of -- approximately the level of  
25 Stream C. That's maybe a 40 or 50 foot distance; sort

JOHN COLEMAN - DIRECT



1 of a broad rocky swale cut in the berm of the biofilter  
2 for water to overflow out of the water filter. It's a  
3 pretty standard type of overflow outlet for some sort of  
4 a retention basin like this.

5 Q In fact, on Exhibit 1024 can you indicate by where  
6 the berm is that you just described or the outlet  
7 rather?

8 A Well, the berm is this around the biofilter, and  
9 the outlet of the biofilter is in that area there.  
10 (Indicating)

11 Q Okay. And have you observed that area?

12 A Yes, I have.

13 Q And is the biofilter outlet on the northeast corner  
14 of the biofilter basin?

15 A Yes.

16 MR. VAN CAMP: Objection. Leading.

17 BY MS. MCGILLIVAY:

18 Q Can you describe where, in relation to the  
19 biofilter, the outlet is?

20 A The outlet is at the northeast corner of the  
21 biofilter. It forms a low portion of the berm. It's  
22 been lined with riprap or rocks to prevent erosion, I  
23 assume.

24 Q Looking at Exhibit 1024, do you see that there are  
25 blue arrows on that figure?

JOHN COLEMAN - DIRECT

1 A Yes.

2 Q Starting with the blue arrow that is alongside the  
3 railroad corridor culvert --

4 A Yes.

5 Q -- does that accurately represent the flow  
6 direction of water as you observed it?

7 MR. VAN CAMP: Objection, Your Honor. Leading.

8 THE COURT: Sustained.

9 BY MS. MCGILLIVAY:

10 Q Can you describe the direction of flow of water as  
11 you observed it at the location of the railroad  
12 corridor?

13 MR. VAN CAMP: Objection. Foundation.

14 THE COURT: Sustained.

15 BY MS. MCGILLIVAY:

16 Q You observed water flowing at the railroad  
17 corridor?

18 MR. VAN CAMP: Objection. Leading.

19 THE COURT: Overruled.

20 THE WITNESS: I observed water flowing at all  
21 these culverts.

22 BY MS. MCGILLIVAY:

23 Q And what direction was that flow, since you  
24 observed it at all the culverts, if you could indicate  
25 it by drawing a line.

JOHN COLEMAN - DIRECT

1 A Okay. At the Highway 27 culvert, the flow was east  
2 to west. At the railroad spur culverts, it was flowing  
3 from the northeast to the southwest. At the farm  
4 culvert it was flowing south. And at the Copper Park  
5 Lane it was flowing south.

6 Q And in between those culverts, did you also observe  
7 flow of water?

8 A Yes, I did.

9 Q And can you indicate on Exhibit 1024 the direction  
10 of the flow of the water between the culverts?

11 A Would you like me to try to draw an arrow? Is  
12 that --

13 Q Sure.

14 A Here the flow between the culverts was in this  
15 direction, to the west. In this area here, the flow was  
16 to the south. And in this area the flow was to the  
17 south, identical to the arrow that's already on the map.  
18 Those arrows represent better than I can do with my  
19 drawing the flow of water.

20 Q Have you observed flow of water from the biofilter  
21 to the -- through the outlet of the biofilter?

22 A Yes, I have.

23 Q Have you observed water flowing from the outlet to  
24 what you described as Stream C just east of the  
25 biofilter?

JOHN COLEMAN - DIRECT

1 MR. VAN CAMP: Object to the form of the  
2 question.

3 THE COURT: Overruled.

4 THE WITNESS: Can you repeat the question?

5 BY MS. MCGILLIVAY:

6 Q Have you observed the flow of water from the outlet  
7 into Stream C as you indicated it on 1024?

8 A Yes, I have.

9 Q And what is the direction, if you could indicate on  
10 your screen, the direction of flow of water from the  
11 biofilter basin to Stream C east of where -- just east  
12 of the biofilter?

13 A The water flow was flowing from the biofilter to  
14 the east towards Stream C.

15 Q And what distance does -- what is the distance  
16 between the biofilter outlet and what you've identified  
17 as Stream C at that location?

18 A In my statement, I said ten feet and I think that  
19 is fairly close to accurate. A lot depends on where you  
20 measure the outlet. I was referring to the lower toe of  
21 the outlet to Stream C was approximately ten feet.

22 Q What do you mean by *lower toe*?

23 A As the outlet slopes down to reach the level of the  
24 surrounding ground, where that slope of the outlet  
25 reaches the level of the surrounding ground I would call

JOHN COLEMAN - DIRECT

1 the toe. It would be the toe of the berm. So from that  
2 lower slope of the outlet to Stream C I would say it was  
3 approximately ten feet.

4 Q Where you just drew your line, your directional  
5 line from the biofilter basin to Stream C, there is  
6 another blue arrow that had been on the figure. Do you  
7 see that arrow?

8 A Yes. I can't see where the head of the arrow is on  
9 the screen here. I can see that there's a dark blue  
10 line there at the biofilter outlet, but I can't see  
11 which direction that arrow is pointed.

12 Q I'm trying to touch my own screen which doesn't  
13 work.

14 A It appears that that arrow is pointing to the east  
15 and that is the direction that I saw water flowing.

16 THE COURT: So which direction -- I thought  
17 this was pointing north. Is the top of the screen north  
18 or south?

19 Q Dr. Coleman, do you know the direction -- and I can  
20 refer you to -- back to Joint Exhibit 1016, which I  
21 believe has a directional notation on it.

22 A Yes. Is there a question?

23 Q The Judge asked a question --

24 A Oh. I thought of you. North on the map -- the top  
25 of the map is to the north.

JOHN COLEMAN - DIRECT

1 THE COURT: Okay. And then I'm confused. You  
2 had an arrow and you said it was pointing to the east,  
3 and it looked to me like it was pointing to the west if  
4 the top of the map was north.

5 THE WITNESS: Okay. I think -- an arrow that I  
6 drew?

7 THE COURT: Well, there's a squiggly arrow.  
8 The highest blue thing on the screen. And --

9 THE WITNESS: Yes. That is water flowing on  
10 the north side of the rail spur. Water flows to the  
11 west --

12 THE COURT: Now to the west. Okay.

13 THE WITNESS: -- in Stream C. So all my arrows  
14 -- is there a way for me to erase a particular line?

15 BY MS. MCGILLIVAY:

16 Q I think you can hit clear last on the upper  
17 right-hand corner.

18 MR. VAN CAMP: Your Honor, I don't think  
19 there's a question pending.

20 THE COURT: You may ask one.

21 THE WITNESS: The arrow I --

22 THE COURT: Wait, Dr. Coleman. Ms. McGillivay  
23 has to ask you another question.

24 BY MS. MCGILLIVAY:

25 Q Can you clarify the flow direction at the railroad  
JOHN COLEMAN - DIRECT

1 spur?

2 MR. VAN CAMP: Object to the form of the  
3 question.

4 THE COURT: Sustained.

5 BY MS. MCGILLIVAY:

6 Q Do you know what the flow direction is or the water  
7 flow is at the north part of the railroad spur?

8 A On the north side of the railroad spur water flows  
9 from east to west --

10 Q Okay.

11 A -- in Stream C.

12 Q Okay. And can you describe then the water flow  
13 throughout the rest of this section as it travels down  
14 to Copper Park Lane?

15 MR. VAN CAMP: Objection. Asked and answered.

16 THE COURT: I think you've covered it. I was  
17 -- I think that the witness said the arrow was pointing  
18 east and I think that's where we got into all that  
19 discussion. But you've clarified that the arrow was  
20 pointing west.

21 BY MS. MCGILLIVAY:

22 Q Have you -- pull your attention back to the monitor  
23 and Exhibit 74. Do you recognize this photograph?

24 A Yes, I do.

25 Q Did you take this photograph?

JOHN COLEMAN - DIRECT

1 A Yes, I did.

2 Q What is it a photograph of?

3 A That's the biofilter basin, with the berm of the  
4 basin in the foreground.

5 Q What date was this photograph taken?

6 A That was in 2004.

7 Q Okay. Looking at the lower right-hand corner --

8 A Yes.

9 Q -- is that the correct date?

10 A That is the correct date.

11 Q June 3rd, 2004?

12 A Yes.

13 Q Okay. You just -- you said you could -- the berm  
14 of the biofilter was visible in this picture. Can you  
15 indicate what you're referring to on the figure?

16 A In the foreground here the soil is somewhat built  
17 up. This is, I believe, a corner of the biofilter, so  
18 there's a berm where I've drawn this blue line and then  
19 the berm continues to the right. And off to the right  
20 here, off to the right-hand side of the photograph is  
21 where the outlet would be or is.

22 Q Show you what's been marked as Exhibit 76. Do you  
23 recognize this photograph?

24 A Yes, I do.

25 Q Did you take it?

JOHN COLEMAN - DIRECT



1 A Yes, I did.

2 Q Did you -- what date did you take it?

3 A June 3rd, 2004.

4 THE COURT: I'm sorry, Ms. McGillivay. My  
5 exhibit list stopped at 73.

6 MS. MCGILLIVAY: Your Honor, that was one of  
7 the other issues I meant to raise. The late exhibits --  
8 we have not yet updated our exhibit list. Would you  
9 like us to refile --

10 THE COURT: We'll take a break right now, not  
11 that you -- but no. I do not want you to refile it, but  
12 I would like you to file a piece of paper that starts  
13 with 74 and goes up. But don't -- do not, whatever you  
14 do, reproduce the other pages because then all my notes  
15 will be -- will have to be transposed.

16 MS. MCGILLIVAY: Okay. Thank you.

17 THE COURT: I don't want to do that. All  
18 right. We'll take 15 minutes. And for everybody's  
19 planning, we'll break for lunch at 12:30.

20 (Recess 10:45-11:00 a.m.)

21 THE COURT: You may proceed.

22 MS. MCGILLIVAY: Thank you, Your Honor. I was  
23 reminded during the break I forgot to move into evidence  
24 Exhibit No. 11 and I move that into evidence.

25 THE COURT: Any objection?  
JOHN COLEMAN - DIRECT

1 MR. VAN CAMP: No objection.

2 THE COURT: Received.

3 MS. MCGILLIVAY: And similarly Exhibit 1002. I  
4 show those --

5 THE COURT: Those are the joint exhibits,  
6 aren't they?

7 MS. MCGILLIVAY: Correct.

8 THE COURT: I'm assuming they're all received.

9 MR. VAN CAMP: We reserved objection to some of  
10 them on the basis of who the witness was and whether  
11 they had foundation and so forth.

12 THE COURT: Oh, okay.

13 MR. VAN CAMP: But I don't have an objection to  
14 introduction of the joint exhibits that have been  
15 discussed so far.

16 THE COURT: Okay. And that would be 1002.

17 MS. MCGILLIVAY: 1016. 1015 and 1024.

18 THE COURT: All right.

19 MS. MCGILLIVAY: Thank you, Your Honor.

20 THE COURT: They're all received.

21 BY MS. MCGILLIVAY:

22 Q Dr. Coleman, I have Exhibit 1024 back up on the  
23 screen and I want to make sure that I heard you  
24 correctly. Can you please tell me the direction of flow  
25 from the biofilter to Stream C at that point in which

JOHN COLEMAN - DIRECT

1 Stream C is adjacent to the biofilter?

2 MR. VAN CAMP: Objection, Your Honor, to  
3 reference of a stream in an area where the witness has  
4 clearly testified that it's a grassy swale.

5 THE COURT: Sustained.

6 BY MS. MCGILLIVAY:

7 Q Dr. Coleman, can you describe the direction of flow  
8 from the biofilter basin to the waterway that is  
9 adjacent to the biofilter?

10 MR. VAN CAMP: Your Honor, I'm going to object  
11 once again to the form of the question. The witness  
12 hasn't testify there's a waterway adjacent to the  
13 biofilter.

14 THE COURT: Perhaps you can just ask it in a  
15 more neutral way.

16 BY MS. MCGILLIVAY:

17 Q Dr. Coleman, can you describe the direction of flow  
18 from the biofilter basin?

19 A The water flow from the biofilter here is going  
20 from west to east to Stream C through the outlet.

21 Q You just used the term *Stream C*. Can you describe  
22 what you mean by that term?

23 A I mean the water flowing -- continuation of the  
24 stream that passes under the rail spur, exits those  
25 culverts, flows along in a channel parallel with the

JOHN COLEMAN - DIRECT

1 berm of the biofilter that passes under the farm road  
2 culvert.

3 Q Does Stream C, as you just described it, stop at  
4 the farm road culvert?

5 MR. VAN CAMP: Objection. Leading.

6 THE COURT: Sustained.

7 BY MS. MCGILLIVAY:

8 Q Can you describe Stream C as you understand that  
9 term *downgradient of the biofilter basin*?

10 A Stream C passes to the east of the biofilter down  
11 underneath the farm culvert here in this area and then  
12 farther south and it passes underneath Copper Park Lane  
13 here in a culvert.

14 Q When you use the term Stream C, can you describe  
15 what area on Exhibit 1024 you're referring to?

16 A When I use the term Stream C, I -- this whole area  
17 starting at the southwest of the photograph here up  
18 under Copper Park Lane. I'm traveling upstream here up  
19 under the farm culvert, past the biofilter outlet and  
20 underneath the culverts under the rail spur, then along  
21 the north side of the rail spur to where the culvert at  
22 Highway 27 is. That is the area I would describe as  
23 Stream C.

24 Q What is the direction of flow of water in Stream C  
25 as you defined it?

JOHN COLEMAN - DIRECT

1 A Exactly opposite from the path of my finger. So it  
2 is from the northeast to the southwest generally across  
3 the site.

4 Q Show you Exhibit 76. I think when we went on break  
5 we were discussing that. Do you recognize Exhibit 76?

6 A Yes. This is a picture I took.

7 Q Now you may have identified this already so I  
8 apologize for being redundant, but what was the date the  
9 photograph was taken?

10 A June 3rd, 2004.

11 Q And what is it a picture of?

12 A This is the lower portion of the outlet of the  
13 biofilter. You can see some of the rock riprap that was  
14 in the biofilter outlet. This is the outlet, probably  
15 the -- this here I'm marking is actually the berm of the  
16 biofilter. Right here is a portion of the biofilter  
17 outlet. This is -- the water is flowing in this picture  
18 from the lower left to the center of the photo in this  
19 direction, and so there's water moving out of the  
20 biofilter across the biofilter outlet to Stream C which  
21 passes through this grassy area here.

22 Q Let me show you another photograph that's been  
23 marked as Exhibit 80. Do you recognize that photograph?

24 A Can I clear the --

25 Q Oh, yes. Thank you.

JOHN COLEMAN - DIRECT

1 A Yes. This is another picture that I took on June  
2 3rd, 2004 of the same area. In fact, a very similar  
3 picture. I think this same rock shows up in both  
4 pictures. Again, water coming out of the biofilter off  
5 to the left side of the photograph, passing through the  
6 outlet, and exiting to the east.

7 Q Where in relation to this photograph is the  
8 biofilter outlet?

9 A This picture is the biofilter outlet.

10 Q And the flow direction is in -- can you indicate  
11 the flow direction?

12 A The flow direction is from the bottom left side of  
13 the photo here and flows to the center of the photo or  
14 the top right of the photo.

15 Q What was your vantage point when you took this  
16 photograph?

17 A I was standing on some of these rocks in the  
18 biofilter. There was water, so I was trying to keep my  
19 feet dry.

20 Q I'm going to show you what's been marked as Exhibit  
21 81. Do you recognize this photograph?

22 A Yes. This is also a photograph I took on June 3rd,  
23 2004, from the same location as the previous two.

24 Q Can you describe what this photograph represents?

25 A On the top left-hand area is standing water in the  
JOHN COLEMAN - DIRECT

1 biofilter. This is the entrance to the biofilter. You  
2 can see some of the rock riprap that's in the biofilter,  
3 and the water is moving from the biofilter through the  
4 outlet and passing from the top left of the photo to the  
5 bottom right of the photo.

6 Q And that photograph was taken on what date?

7 A June 3rd, 2004.

8 MS. MCGILLIVAY: I'm going to move Exhibits 76,  
9 80 and 81, those three photographs, into evidence.

10 THE COURT: Any objection?

11 MR. VAN CAMP: No objections.

12 THE COURT: Received.

13 BY MS. MCGILLIVAY:

14 Q Turn your attention back to 1024. Can you indicate  
15 on this figure the area that you just described in  
16 Exhibits 76, 80 and 81, the three photographs?

17 A The area -- those three photographs represent the  
18 outlet to the biofilter that I circled in the photo.

19 Q And they were taken -- on the day they were taken,  
20 June 3rd, 2004, did you observe flow of water from the  
21 biofilter to Stream C?

22 A Yes, I did.

23 MR. VAN CAMP: Objection. Leading.

24 THE COURT: Overruled.

25 BY MS. MCGILLIVAY:

JOHN COLEMAN - DIRECT

1 Q I'm going to show you what's been marked as Exhibit  
2 82. Do you recognize this photograph?

3 A Yes, I do.

4 Q What is this a photograph of?

5 A This is a photo I took on June 3rd, the same day.

6 It is Stream C immediately below Copper Park Lane.

7 There is -- and it's part of the construction of Copper  
8 Park Lane. There was a lot of riprap placed in Stream C  
9 immediately adjacent to the road. So I'm standing  
10 approximately on the top of a culvert under Copper Park  
11 Lane; the water is flowing in this direction, and then  
12 it enters the natural channel here and flows into the  
13 woods. So the flow direction is as I've indicated on  
14 the photograph.

15 Q Looking back to Figure 1024, can you indicate on  
16 that figure where that photograph was taken, the  
17 photograph which is Exhibit 82.

18 A It was taken right here looking in this direction,  
19 (indicating) looking to the southwest from Copper Park  
20 Lane.

21 Q And that was also on June 3rd, 2004?

22 A Yes, it was.

23 Q On Exhibit 24 then, on June 4th -- excuse me, June  
24 3rd, 2004, can you indicate a complete line where you  
25 observed flow of water on that date?

JOHN COLEMAN - DIRECT



1 A I observed --

2 MR. VAN CAMP: Your Honor, I'm going to object.

3 I think the reference was to Exhibit 24 and for purposes  
4 of clarifying the record --

5 THE COURT: It's 1024.

6 MR. VAN CAMP: 1024. Thank you.

7 THE WITNESS: I observed water passing out of  
8 this culvert here at Highway 27. I observed water  
9 passing out of here and into this channel. On that day  
10 I observed water flowing here and flowing in Stream C  
11 along this section, and then I observed water flowing in  
12 Stream C here and on the southern end of Copper Park  
13 Lane.

14 BY MS. MCGILLIVAY:

15 Q In between the -- did you observe any dry areas in  
16 Stream C on the figure indicated in Exhibit 1024 on June  
17 3rd, 2004?

18 A I did not.

19 MS. MCGILLIVAY: Your Honor, I move Exhibit 82  
20 into the record.

21 MR. VAN CAMP: No objection.

22 THE COURT: Received.

23 BY MS. MCGILLIVAY:

24 Q Dr. Coleman, I'm going to direct your attention  
25 back to the screen. Exhibit 12 should be showing. Do

JOHN COLEMAN - DIRECT

1 you recognize this photograph?

2 A Yes. This is a photograph I also took in 2004 in  
3 April.

4 Q On the lower right-hand corner of the photograph it  
5 says 4-19-2004. Is that a correct date?

6 A That is.

7 Q And what is this a photograph of?

8 A This is -- I'm standing on the edge of Copper Park  
9 Lane looking north. You can see the upper lip of the  
10 culvert that goes underneath Copper Park Lane. Stream C  
11 is flowing towards me from the north. In the background  
12 you can see the reclamation effort for the rail spur had  
13 been completed. There's still some erosion control  
14 fabric along the rail spur, and you can see Stream C  
15 coming down here through the photograph -- passing under  
16 the --

17 Q Do it again.

18 A Stream C coming down through the photograph,  
19 passing under the farm road culvert right here -- you  
20 can see the mouth of that culvert -- and entering the  
21 culvert under Copper Park Lane.

22 On the upper left of the photo is the berm of the  
23 biofilter in this area right here. (Indicating)

24 Q In relation to this photograph where would the  
25 biofilter outlet be?

JOHN COLEMAN - DIRECT

1 A The biofilter outlet is right in this area here,  
2 obscured by tall dead grass. (Indicating)

3 MS. MCGILLIVAY: I'm going to move Exhibit 12  
4 into the record.

5 MR. VAN CAMP: No objection.

6 THE COURT: Received.

7 BY MS. MCGILLIVAY:

8 Q I'm going to show you what's been marked as Exhibit  
9 15, which it should be on your screen. Do you recognize  
10 this document?

11 A Yes. This is a photograph I took that same day,  
12 April 19th, 2004.

13 Q And what is this a photograph of?

14 A It's a photograph of my daughter. Setting her  
15 aside, it is the biofilter in the background and you can  
16 see in the very back is one of the inlets to the  
17 biofilter, riprap area. But the biofilter, pond, the  
18 water and Stream C flowing down into the culvert under  
19 Copper Park Lane. In this area right here where the  
20 tall vegetation is is where the biofilter outlet is.

21 Q Was this photograph taken at approximately the same  
22 time as Exhibit 12?

23 A Yes.

24 MS. MCGILLIVAY: Move Exhibit 15 into the  
25 record.

JOHN COLEMAN - DIRECT

1 MR. VAN CAMP: No objection.

2 THE COURT: Received.

3 BY MS. MCGILLIVAY:

4 Q Turning back now to Exhibit 1024, can you indicate  
5 on Exhibit 1024 the area that was depicted in Exhibits  
6 12 and 15?

7 MR. VAN CAMP: Object to the form of the  
8 question. I believe he has already answered as well.

9 THE COURT: I don't think he needs to answer  
10 this.

11 BY MS. MCGILLIVAY:

12 Q On April 19th, 2004, did you observe water flowing  
13 in Stream C?

14 A April -- I'm sorry. These dates are --

15 Q I can refer you back to Exhibit 15.

16 A On this date I do not believe I went actually right  
17 up to the outlet of the biofilter.

18 Q On the date that Exhibits 12 and 15 were taken, can  
19 you indicate on Exhibit 1024 where you observed water  
20 flowing?

21 A I observed water flowing from roughly a little bit  
22 south of the culverts exiting the rail spur area down  
23 through -- so underneath the farm road culvert and then  
24 down into the culvert under Copper Park Lane. And then  
25 I also observed water flowing out of that culvert down

JOHN COLEMAN - DIRECT

1 towards the Flambeau River.

2 Q Do you recognize Exhibit 16, which appears on your  
3 screen?

4 A Yes.

5 Q Did you take that photograph?

6 A Yes. I took that photograph April 19th, 2004.

7 Q And was this during the same visit or approximately  
8 the same time that the photographs taken that are  
9 Exhibit 12 and 15 were taken?

10 A Yes, it is.

11 Q And can you describe what is depicted in Exhibit  
12 16?

13 A This is looking northeast towards Copper Park Lane.  
14 Copper Park Lane is along the top of this grassy area.  
15 I'm standing in the natural channel of Stream C and  
16 looking up towards the culvert underneath Copper Park  
17 Lane. The culvert is right in this area here.  
18 (Indicating) The water is flowing towards me from the  
19 north or northeast.

20 MS. MCGILLIVAY: I move Exhibit 16 into  
21 evidence.

22 MR. VAN CAMP: No objection.

23 THE COURT: Received.

24

25 BY MS. MCGILLIVAY:  
JOHN COLEMAN - DIRECT

1 Q Have you observed Stream C where it intersects with  
2 the Flambeau River?

3 A Yes, I have.

4 Q And have you observed water flowing in Intermittent  
5 Stream C to the Flambeau River?

6 A I've observed water flowing exiting Stream C into  
7 the Flambeau River, yes.

8 Q Have you observed water in Stream C -- flowing  
9 water north of Copper Park Lane in Stream C flowing  
10 under Copper Park Lane to the Flambeau River?

11 MR. VAN CAMP: Objection. Object to the form  
12 of the question. Objection. Leading.

13 THE COURT: Sustained.

14 BY MS. MCGILLIVAY:

15 Q Looking at Exhibit 1016, can you indicate where you  
16 have in the past seen flow of water along Stream C?

17 MR. VAN CAMP: Object to the form of the  
18 question.

19 THE COURT: Overruled.

20 THE WITNESS: Can you repeat the question?

21 BY MS. MCGILLIVAY:

22 Q Can you indicate on Exhibit 1016 the -- based on  
23 your past observations, the extent of flow that you  
24 observed in Intermittent Stream C?

25 A Can you zoom in a little bit? It's hard to draw on  
JOHN COLEMAN - DIRECT

1 something that small.

2 Q Sure.

3 A I observed water in Stream C from Highway 27 along  
4 its entire length to this point.

5 THE COURT: When you say this point, what are  
6 you --

7 THE WITNESS: This point south of Copper Park  
8 Lane.

9 THE COURT: Oh.

10 THE WITNESS: On many occasions. And then on  
11 two occasions walked the length of Stream C and saw  
12 water in that streambed. And on one occasion there were  
13 occasional sandy areas where the stream had soaked into  
14 the sand on one occasion.

15 On another occasion there was what appeared to be  
16 continuous surface water connection down to the outlet  
17 at the Flambeau River.

18 BY MS. MCGILLIVAY:

19 Q Have you observed continuous surface water  
20 connection from Stream C at Highway 27 to the Flambeau  
21 River?

22 A I believe I have.

23 MS. MCGILLIVAY: No further questions.

24 THE COURT: Mr. Van Camp.

25 MR. VAN CAMP: Thank you very much. I do not  
JOHN COLEMAN - DIRECT

1 have copies of the recently identified exhibits.

2 MS. MCGILLIVAY: Yes, you do. I gave them to  
3 you this morning.

4 MR. VAN CAMP: Okay. Oh, okay. Well then I  
5 think I'll have to use the ELMO. Judge, it might be  
6 easier if counsel would agree to pull up the photographs  
7 electronically since I didn't get electronic copies of  
8 them before today. So if they're willing to do that, I  
9 think that might be easier for everybody.

10 MS. MCGILLIVAY: Yes.

11 MR. VAN CAMP: Okay.

12 CROSS-EXAMINATION

13 BY MR. VAN CAMP:

14 Q Dr. Coleman, it's my understanding that you visited  
15 the mine site eleven times; correct?

16 A Yes.

17 Q When were those visits?

18 A You want the dates for every visit? I can read  
19 from my statement, otherwise I'm not going to be able to  
20 tell you the exact dates for those eleven visits.

21 Q Okay. Well, feel free to take a look at your  
22 declaration. I believe you set them out in paragraph 8.

23 A Yes.

24 Q You had four visits in 2004; correct?

25 A That is correct.

JOHN COLEMAN - CROSS



1 Q And those four visits were more than five years  
2 before this lawsuit was filed; correct?

3 A Yes.

4 Q You visited in 2004 on April 18th, April 19th, June  
5 3rd, and August 18th; correct?

6 A Yes.

7 Q When you visited on those dates, I believe you saw  
8 the -- you looked at the biofilter outlet closely.

9 A On some of the dates that I visited, I did look at  
10 the biofilter closely, yes.

11 Q Which of those dates?

12 A Okay. I think in a further paragraph, I can give  
13 you those dates if we --

14 Q Look at paragraph 14, page 5.

15 A Yes. Well, April 19, June 3rd, August 18th, and  
16 the fourth occasion would be -- in 2007 during the COC  
17 hearing, that would have been, I think, April 17th,  
18 2007.

19 Q When you say that you observed the biofilter outlet  
20 closely, what do you mean by that?

21 A I was with -- close enough to see the biofilter to  
22 see if there was water flowing in the biofilter.

23 Q What do you mean by *water flowing in the biofilter*?

24 A Some water moving in the biofilter.

25 Q Okay. You said the biofilter looks like --  
JOHN COLEMAN - CROSS

1 A Not biofilter, I mean biofilter outlet. So I was  
2 close enough to see if there was water in the outlet.

3 Q Okay. How many occasions were you close enough to  
4 the biofilter outlet to see whether water was coming out  
5 of it?

6 A On four occasions.

7 Q Would you take a look at paragraph 15 on page 5 of  
8 your declaration.

9 A Um-hmm.

10 Q You say that "on three of the four occasions, I  
11 observed the biofilter's outlet. I saw water  
12 discharging from the biofilter."

13 A Yes.

14 Q Is that an accurate statement?

15 A I believe it is.

16 Q So which three occasions is that referring to?

17 A That would be April 19th, I think -- April 19th,  
18 June 3rd, and August 18th.

19 Q All in 2004.

20 A Yes.

21 Q Did you see water flowing out of the biofilter when  
22 you were closely observing the biofilter at any other  
23 time?

24 A One other time during the COC field trip I may or I  
25 may not have. I cannot definitely say whether there was  
JOHN COLEMAN - CROSS

1 water exiting through the outlet at that time or not.

2 Q Well, if there was, you didn't put it in your  
3 declaration, did you?

4 A I did not because I could not definitely determine  
5 that.

6 Q On any of the three occasions: April 19th, 2004;  
7 June 3rd, 2004; August 18th, 2004, was anybody else with  
8 you?

9 A Let's see, I'm trying to remember when these -- I  
10 believe on August 18th, 2004, was when the DNR and  
11 Flambeau Mining Company had a field trip to look at  
12 Stream C.

13 Q Any other occasion in 2004 when anybody else was  
14 with you?

15 A Well, my daughter was with me in the photograph  
16 that's on the screen.

17 Q I'm sorry, I was asking you about times when you  
18 were observing the biofilter outlet closely.

19 A I believe April 19th, 2004, was one of those times.

20 Q And who was with you?

21 A My daughter.

22 Q Okay. Are you aware of any tests of the water  
23 coming out of the biofilter on the occasions that you  
24 claim it was coming out on April 19th, 2004; June 3rd,  
25 2004; or April 18th, 2004 -- August. Sorry --

JOHN COLEMAN - CROSS

1 MS. MCGILLIVAY: Objection.

2 MR. VAN CAMP: -- August 18, 2004.

3 MS. MCGILLIVAY: Outside the scope of cross.

4 THE COURT: Overruled.

5 THE WITNESS: Can you repeat the question?

6 BY MR. VAN CAMP:

7 Q Are you aware of any tests of the water that came  
8 out -- that you claim came out of the biofilter outlet  
9 on April 19th, 2004; June 3rd, 2004; and August 18th,  
10 2004?

11 A Off the top of my head, I believe that there was a  
12 sample taken on April 19th, 2004, but my recollection of  
13 that is fairly sketchy.

14 Q You would agree, would you not, that standing on  
15 Copper Park Lane you cannot see whether or not water is  
16 coming out of the biofilter outlet?

17 A I would say in these photographs you cannot. I  
18 think when the water is high enough, it can be seen from  
19 Copper Park Lane, I believe.

20 Q How far away is Copper Park Lane from the biofilter  
21 outlet?

22 A Seventy-five/one hundred feet.

23 Q Seventy-five or a hundred feet?

24 A Maybe a hundred feet, yeah.

25 Q Well, other than the four occasions when you  
JOHN COLEMAN - CROSS

1 closely observed the biofilter, which were all in 2004  
2 -- I'm sorry, were in 2004 except one in 2007, all of  
3 your observations were from Copper Park Lane; correct?

4 A That is correct.

5 Q So at best from that vantage point you would be  
6 trying to determine whether water was flowing out of the  
7 biofilter outlet from 75 or 100 feet or more; correct?

8 A On other occasions when I was not at the outlet,  
9 that would be the case. But --

10 Q Mr. Coleman, did you ever measure the amount of  
11 flow coming out of the biofilter?

12 A No, I did not.

13 Q Did you ever measure the flow going out of the  
14 wetland into the culvert under Copper Park Lane?

15 A You're talking about this area, the culvert, the  
16 water entering the culvert under Copper Park Lane?

17 Q Right.

18 A No, I did not.

19 Q Did you ever measure the flow of water anywhere  
20 between what you've called Highway 27 culvert all the  
21 way down to Copper Park Lane south of -- I'm sorry,  
22 Stream C south of Copper Park Lane?

23 A By flow, you mean installation of a flow or using  
24 Doppler radar or some such technique to measure flow?

25 Q Yes.

JOHN COLEMAN - CROSS

1 A No, I did not.

2 Q Do you know in any of the years that you were out  
3 there -- you were out there in 2004; correct?

4 A Correct. Yes.

5 Q You were not out there in 2005?

6 A Not to my recollection, no.

7 Q You were out there once in 2006; correct?

8 A I believe that to be the case, yes.

9 Q You were out there twice in 2007?

10 A Yes.

11 Q You were out there once in 2008?

12 A Yes.

13 Q On any of those occasions, were you aware of how  
14 many days during the years 2004, 2005, 2006, 2007, 2008  
15 to present, how many days there was flow in what you  
16 have referred to as Stream C north of Copper Park Lane?

17 A Can you repeat the question?

18 Q Sure. How many days did Copper Park -- I'm sorry.  
19 How many days did Stream C in the area you've identified  
20 north of Copper Park Lane flow?

21 A When I was there it flowed every time. When I  
22 wasn't there I wouldn't know.

23 Q Okay. So four times in 2004; correct?

24 A Yes.

25 Q No times in 2005?

JOHN COLEMAN - CROSS

1 A Is the question about no times I was there or no  
2 times it was flowing?

3 Q Well, do you have any personal observations of any  
4 flow in 2005?

5 A I have no observations in 2005 whether it was  
6 flowing or not flowing.

7 Q Do you have any observations in 2006 whether it was  
8 flowing or not?

9 A I have no observations.

10 Q Do you have any observations in 2007 whether it was  
11 flowing?

12 A Yes, I do.

13 Q How many?

14 A Sorry, can you repeat your previous -- I think I  
15 might have misanswered your previous question.

16 Q Sure. My question is you have claimed that Stream  
17 C exists north of Copper Park Lane; correct?

18 A I have observed flow north of Copper Park Lane,  
19 yes.

20 Q Okay. And in some of the places where you observed  
21 flow, you observed flow over a grassy area; correct?

22 A Yes.

23 Q That was sheetflow; correct?

24 A Can you define sheetflow.

25 Q Have you ever used the term *sheetflow*?

JOHN COLEMAN - CROSS

1 A Personally probably not, but I'm not sure.

2 Q Okay. I'm talking about water flowing over a  
3 grassy area.

4 A When I observed that water flowing over the grassy  
5 area, it was in a defined flow; not spread out across a  
6 broad area. So I would not -- I would not describe that  
7 as sheetflow. I worked in Florida and they have  
8 sheetflow across the Everglades, which is broad  
9 expansive flat areas. Sheetflow requires really flat  
10 topography.

11 Next to the biofilter is an area that has a channel  
12 that's slightly depressed, and so the water is funneled  
13 into that channeled area. So I would not call that  
14 sheetflow.

15 Q All right. Let's talk about the channel. Did you  
16 have any pictures of a channel north of the stub road

17 A No.

18 Q When you refer to a channel north of the stub road  
19 culvert, you're referring to a grassy swale; correct?

20 A I think it could be called also grassy swale, yes.

21 Q I believe you called it a grassy swale.

22 A I did, yes.

23 Q Okay.

24 THE COURT: Well, I think he called it a swale.  
25 I'm not sure he called it grassy.

JOHN COLEMAN - CROSS



1 Q Okay. It is a swale covered with grass, is it not?

2 A I mentioned it has grass in the area and also I  
3 think I called it a swale, so...

4 Q On how many occasions do you believe that you saw  
5 flow north of Copper Park Lane in 2007?

6 A In 2007 how many occasions I saw flow. Well, it's  
7 listed in my deposition on April 17th and May 17th in  
8 2007 I saw flow.

9 Q Okay. So twice.

10 A Yes.

11 Q How many occasions did you see flow north of Copper  
12 Park Lane in 2008?

13 A One time.

14 Q What about 2009?

15 A I visited the site one time and I saw flow there,  
16 yes.

17 Q That's not in your declaration, is it?

18 A I'm sorry. 2009. Sorry, I thought you were --  
19 sorry. That was a misstatement. You said 2009?

20 Q That's correct.

21 A I was reading ahead. Sorry. I did not visit the  
22 site in 2009.

23 Q What about 2010?

24 A I visited the site one time and I saw flow.

25 Q What about 2011?

JOHN COLEMAN - CROSS

1 A I have not. I was not at the site in 2011.

2 Q So those are all of the occasions on which you have  
3 seen flow; correct?

4 A In paragraph 8 of my statement I listed all the  
5 occasions where I observed Stream C and on those  
6 occasions I observed flow.

7 Q So what was the one occasion that you referred to  
8 in your declaration when you didn't see flow?

9 A Can you point me out where I made that statement?

10 Q In paragraph 14 of your declaration you refer to  
11 four occasions. Do you see that?

12 A Yes.

13 MS. MCGILLIVAY: Objection. Are you talking  
14 about paragraph 15?

15 MR. BENDER: 15? No, I'm talking about 14.

16 THE COURT: Do you have an objection?

17 MS. MCGILLIVAY: Objection. Misstates his  
18 testimony.

19 THE COURT: I'm sorry?

20 MS. MCGILLIVAY: Misstates his testimony.

21 MR. VAN CAMP: I'm referring him to paragraph  
22 14 of his declaration.

23 BY MR. VAN CAMP:

24 Q Refers to four occasions; correct?

25 A Yes. Yes. 14, yeah.  
JOHN COLEMAN - CROSS

1 Q And then paragraph 15 of your declaration says on  
2 three of the four occasions you observed the biofilter  
3 outlet; correct?

4 A On three of the four occasions, yes.

5 Q Were you -- when you say you didn't observe the  
6 biofilter outlet, did you see flow in Stream C on that  
7 date at any of the locations north of Copper Park Lane?

8 A I want to make sure I understand your question. On  
9 this date, the one -- there's one of the four occasions  
10 when I observed the outlet closely. I did not state  
11 that I saw flow and you're asking me if I saw flow in  
12 Stream C.

13 Q Correct.

14 A Yes, I did.

15 Q Where?

16 A That would have been in 2007 during the visit, I  
17 think it was the May 17th, 2007, visit for the COC  
18 hearing, and we went to a number of places at the site  
19 and there was flow at Copper Park Lane. Without  
20 reviewing photographs, I probably couldn't tell you for  
21 sure where else I saw that, but...

22 Q Maybe I'm misunderstanding your declaration, but in  
23 paragraph 15 of your declaration you say on three of  
24 four occasions. Do you see that?

25 A Yes.

JOHN COLEMAN - CROSS

1 Q Okay. Which three of the four occasions are you  
2 referring to?

3 A I'm referring to April 19th, 2004; June 3rd, 2004;  
4 and August 18th, 2004, on occasions where I saw flow at  
5 the biofilter outlet.

6 Q And what is the fourth occasion you're referring to  
7 there that apparently you did not?

8 A On May 17th, 2007, I don't have definitive  
9 recollection of whether I saw flow or not --

10 Q Okay.

11 A -- in the outlet of the biofilter.

12 Q Okay.

13 MR. VAN CAMP: Could we pull up 1024.

14 Q Do you have the document 1024 before you?

15 A I do.

16 Q And you see the dotted line that is an odd shape to  
17 the right of the biofilter that defines a wetland. Do  
18 you see that?

19 A White line? Yes. White dotted line.

20 Q I thought it was light blue. But at any rate, it  
21 is a dotted line that defines the area of the biofilter.  
22 Do you agree with that?

23 A Sorry. Can you restate your question? I thought  
24 you were asking me about to the right of the biofilter,  
25 but are you talking about the biofilter itself?

JOHN COLEMAN - CROSS

1 Q Okay. Let me just draw it on here. (Indicating)  
2 I've tried to draw a red circle around an area that  
3 includes a white or very light blue dotted area that is  
4 a field delineated *wetland*. Do you see that?

5 A I see that, yes.

6 Q You didn't do a wetland delineation yourself, did  
7 you?

8 A No, I did not.

9 Q Do you have any reason to disagree with the  
10 delineation of the wetland as it appears on Exhibit JE  
11 1024?

12 A I don't have a reason to agree or disagree with it.

13 Q When you were in that area, did you agree that you  
14 were walking through a wetland?

15 A Some of those areas -- I did not walk through all  
16 the area delineated by that boundary. Some of those  
17 areas certainly I would describe as having wetland  
18 plants.

19 Q Now during your testimony you provided us with some  
20 dimensions and one of the dimensions that you provided  
21 us with was the rocky slope coming down from the  
22 biofilter. Do you recall that?

23 A Yes.

24 Q Can you draw a circle around the place on Exhibit  
25 JE 1024 where you believe that rocky slope is.

JOHN COLEMAN - CROSS

1 A In the northeast corner of the biofilter is where  
2 the outlet is and that rocky slope that I described.

3 Q Now you've drawn a pretty good-sized blue circle on  
4 there. Do you think that -- if you want to look at the  
5 key in the lower right-hand corner of JE 1024, you'll  
6 see the dimensions down there. Do you see that?

7 A Yes.

8 Q And so the circle that you drew is what, 60 or more  
9 feet wide?

10 A Yeah. If you want to zoom in farther, I'll try to  
11 more accurately outline the area that I think is the  
12 rocky slope.

13 So I believe the outlet to be roughly in this area.

14 (Indicating) I do PIS mapping and if I produced a  
15 product like that and tried to claim an area or a  
16 distance, I'd probably get fired. So that is a rough  
17 approximation of where that rocky slope is.

18 Q Okay. If we zoom out at this time, I think we can  
19 determine approximately how -- well, it didn't go with  
20 us. Okay.

21 Did you study the biofilter berm construction at  
22 all?

23 A I observed -- you mean during construction?

24 Q Yes.

25 A No, I did not.

JOHN COLEMAN - CROSS

1 Q Did you observe it after construction, after it was  
2 built?

3 A I was there on a number of occasions and saw the  
4 berm after it was built, after it was vegetated with  
5 grass, yes.

6 Q How wide is the berm at the top?

7 A Maybe 10, 12 feet.

8 Q And how long -- how high is the berm above the  
9 ground surrounding it?

10 A Maybe eight feet. That's a rough guess. You're  
11 asking -- I'm not even sure it's appropriate for me to  
12 be making guesses based on a visual, no measurements,  
13 but recollection of my observation several years ago.

14 Q So we agree that you took no measurements about the  
15 berm; correct?

16 A That is correct.

17 Q And you took no measurements from the lip of the  
18 berm to the lowest part of the wetland depicted in JE  
19 1024?

20 A That is correct.

21 Q Did you take any tests regarding the level of the  
22 groundwater in the area east of the biofilter?

23 A No. There's some monitoring wells maintained by  
24 Flambeau Mining Company that looked at the groundwater  
25 level, but I have not done any tests which would involve  
JOHN COLEMAN - CROSS

1 drilling wells and things.

2 Q And is there a well that you're aware of that  
3 reports the groundwater level to the east of the  
4 biofilter?

5 A I believe there's a groundwater well quite a ways  
6 to the east, and at this point I wouldn't be able to  
7 identify its exact location. But my guess is several  
8 hundred feet away, at least.

9 Q You would agree though that the -- that nothing you  
10 did took into account the level of the groundwater to  
11 the east of the biofilter; correct?

12 A My observations did not take into account  
13 groundwater level.

14 Q Okay. So it's true, is it not, that on the  
15 occasions that you claim you saw water going out through  
16 the biofilter outlet, that you took no measurements of  
17 the amount of that flow; correct?

18 A That is correct.

19 Q What, if any, tests did you perform when you claim  
20 you saw water coming out of the biofilter to determine  
21 where that water went?

22 MS. MCGILLIVAY: Objection. Asked and  
23 answered.

24 THE COURT: Sustained.

25 BY MR. VAN CAMP:

JOHN COLEMAN - CROSS



1 Q Do you know what the construction of the biofilter  
2 outlet is?

3 A By that you mean the materials?

4 Q Yes.

5 A I know at the surface there's some large rocks,  
6 presumably I assume to prevent erosion due to flow. I  
7 don't know the detail of the materials used for the  
8 construction, no.

9 Q Do you know what's under those rocks?

10 A I do not.

11 Q Is it dirt?

12 MS. MCGILLIVAY: Objection. Foundation.

13 THE COURT: Sustained.

14 MR. VAN CAMP: Okay.

15 BY MR. VAN CAMP:

16 Q If a drop of water came out of that biofilter, what  
17 would happen to it?

18 A Sounds like a very hypothetical question. A drop  
19 of water exited the biofilter in what direction?

20 Q Out of the outlet.

21 A Out of the outlet. It would tend to flow downhill.

22 Q Okay. It might infiltrate into the dirt?

23 A A drop of water could infiltrate into the dirt.

24 Q Might evaporate?

25 A It might evaporate.

JOHN COLEMAN - CROSS

1 Q The area of the biofilter outlet is choked with  
2 plants; correct?

3 A I don't think I would use the term *choked*. There's  
4 some -- there are some plants growing in that outlet as  
5 could be seen in the photographs I took.

6 Q That drop of water could be taken up by a plant?

7 A A drop of water could be taken up by a plant, yes.

8 Q What about two drops of water? Same things would  
9 happen; correct?

10 A I'm not a plant physiologist, so how much water a  
11 plant can absorb over a certain period of time I'm not  
12 qualified to answer that. I don't know. And plus, is  
13 that over two weeks or is that over five minutes? I  
14 would say a plant probably could not take up two drops  
15 of water in five minutes, but there are a lot of  
16 qualifiers. You need to be more explicit, I guess, in  
17 my mind.

18 Q What studies did you do about any of those  
19 qualifiers?

20 A I did no studies other than observing the outlet.

21 Q So basically all you can tell this Court is about  
22 the days that you observed it.

23 A That is correct.

24 Q You would agree also, wouldn't you, that the volume  
25 of outflow from the biofilter would impact where it

JOHN COLEMAN - CROSS

1 goes?

2 A I would say the volume of water might impact on how  
3 that water was partitioned to different fates.

4 Q Are you aware of any studies done regarding the  
5 volume of outflow from the biofilter?

6 A No, I am not.

7 Q Are you aware of any studies indicating how many  
8 days in any year there was a flow out of the biofilter?

9 MS. MCGILLIVAY: Objection. Asked and  
10 answered.

11 THE COURT: Overruled.

12 THE WITNESS: Can you repeat the question?

13 BY MR. VAN CAMP:

14 Q Are you aware of any studies indicating how many  
15 days in any year there was a flow out of the biofilter?

16 A The only studies I'm aware of, there were water  
17 samples taken by Flambeau Mining Company at the outlet.  
18 And as explicit studies as to flow, I'm not aware of any  
19 studies from the outlet.

20 Q Are you aware of any studies indicating how many  
21 days there is water standing in the wetland east of the  
22 biofilter?

23 A No.

24 MS. MCGILLIVAY: Objection. Foundation.

25 A I'm not aware.

JOHN COLEMAN - CROSS

1 Q Are you aware of any studies --

2 THE COURT: Overruled.

3 MR. VAN CAMP: I'm sorry.

4 BY MR. VAN CAMP:

5 Q Are you aware of any studies of surface water  
6 movement within the wetland east of the biofilter?

7 A By surface water movement in that area, do you mean  
8 flow direction, flow quantity, things like that?

9 Q Right.

10 A No. I'm not aware of any study of that sort.

11 Q Are you aware of any experiments conducted by  
12 anybody to determine the direction of flow of anything  
13 coming out of the biofilter?

14 A Studies to determine the direction of flow --

15 Q Correct.

16 A -- of water coming out of the biofilter? I mean,  
17 well, if the water is flowing downhill, so I don't think  
18 there was a need for a study of that sort. But a study,  
19 other than knowing that water flows downhill, no, there  
20 was -- as far as I know there was no study.

21 Q Well, you said that there are big rocks at the  
22 biofilter outlet; correct?

23 A Big in that, you know, size of a half loaf of bread  
24 maybe, a loaf of bread.

25 Q The water would have to go around those; correct?  
JOHN COLEMAN - CROSS

1 A Yes.

2 Q Do those rocks direct the water to the north?

3 A You're talking about as the water is flowing around  
4 this loaf, half-loaf sized rock, whether some of that  
5 water might have gone around to the left side and some  
6 gone around to the right side and the left side being to  
7 the north. Yes, that could have happened.

8 Q And then there are rocks below that, correct, that  
9 would again direct the water?

10 A Scattered rocks. I think I'd be hard pressed to  
11 agree that scattered rocks are going to generally direct  
12 the water. The water will flow around the rocks and  
13 momentarily will go in some other direction rather than  
14 to the east. But I couldn't testify that the rocks were  
15 having any kind of significant impact on the general  
16 flow direction at that outlet. I couldn't say that.

17 Q Okay. Are you aware of any tests done on  
18 invertebrates within the marsh to the east of the  
19 biofilter?

20 A No, I am not.

21 Q Are you aware of any tests done regarding fish in  
22 the wetland to the east of the biofilter?

23 A By tests you mean electroshocking or netting of  
24 fish to look at populations or something of that sort?

25 Q Right.

JOHN COLEMAN - CROSS

1 A The only study I'm aware of that looked at -- well,  
2 one study I'm aware of that looked at biotin in Stream  
3 C, I think it was done about the time of the DNR -- the  
4 visit, there was a report done looking at biotin in  
5 Stream C, but I don't recall that it looked explicitly  
6 in that area immediately adjacent to the biofilter  
7 outlet.

8 Q Are you speaking of the water quality assessment  
9 that Mr. Roesler participated in?

10 A Can you give me the date of that?

11 Q 2012.

12 A No. I'm talking about a study done back in -- it  
13 must have been around 2004/2005.

14 Q Okay. But you don't believe that the study was  
15 done in the wetland to the east of the biofilter?

16 A I'm not aware that it was. I couldn't testify one  
17 way or the other. It's been, you know, a long time  
18 since I looked at that study.

19 Q Okay. Are you aware of any tests or experiments  
20 involving insects in that wetland to the east of the  
21 biofilter?

22 A No, I'm not.

23 Q Are you aware of any tests comparing biological  
24 matter between the biofilter and the wetland to the east  
25 of it?

JOHN COLEMAN - CROSS

1 A Can you define what you mean by biological matter?  
2 You mean living organisms or are you talking about  
3 carbon particles or --

4 Q Let's begin with living creatures.

5 A Between the biofilter and the area to the east of  
6 it, no, I'm not.

7 Q What about any dissolved organic carbon studies  
8 between the wetland and the biofilter?

9 A No, I'm not.

10 Q Are you aware of any other plant studies between  
11 the biofilter and the wetland to the east of it?

12 A No.

13 Q Are you aware of any tests related to those same  
14 things between the wetland to the east of the biofilter  
15 and Stream C south of Copper Park Lane?

16 A Any tests that looked at the -- can you repeat the  
17 question, please.

18 Q Certainly. Are you aware of any tests that compare  
19 the biological matter? And we'll begin with living  
20 matter between the wetland east of the biofilter and  
21 Copper Park Lane south -- I'm sorry, Stream C south of  
22 Copper Park Lane.

23 A Well, my understanding -- I mean there are wetland  
24 studies dealing in wetlands and looking at wetland  
25 vegetation that occurred in both those areas.

JOHN COLEMAN - CROSS

1 Q Relative --

2 A But are you talking about individual aquatic  
3 organisms or are you talking --

4 Q Well, we'll take you through that. Are you aware  
5 of any studies that study the living creatures in the  
6 wetland east of the biofilter and compare them with  
7 water in Stream C south of Copper Park Lane?

8 A Compare the organisms with the water in Stream C --  
9 I still -- are you talking about the aquatic organisms  
10 then in that area that you're calling the wetland and  
11 farther down at Copper Park Lane? I'm not aware of any  
12 aquatic organisms there. As I said, there are wetland  
13 plants that occurred in both areas.

14 If you're talking about the chemistry of those  
15 organisms, that's maybe a different question.

16 Q Let's break it down further. Are you aware of any  
17 study of fish in the wetland and compare that to the  
18 fish in Stream C --

19 A No --

20 Q -- south.

21 A No. I'm not aware of any.

22 Q Are you aware of any studies conducted of  
23 macroinvertebrates in the wetland and compare that to  
24 the macroinvertebrates in Stream C south of Copper Park  
25 Lane?

JOHN COLEMAN - CROSS



1 A No. I'm not aware.

2 Q Are you aware of any samples of dissolved organic  
3 matter taken in the wetland to the east of the  
4 biofilter?

5 A No, I am not.

6 Q Are you aware of any tests that compare dissolved  
7 organic matter from the wetland east of the biofilter to  
8 dissolved organic matter in Stream C south of Copper  
9 Park Lane?

10 A No, I am not.

11 Q Are you aware of any studies at all that were --  
12 that attempt to determine what is going on in the  
13 broadest sense within the wetland to the east of the  
14 biofilter?

15 MS. MCGILLIVAY: Objection. Vague.

16 THE COURT: Sustained.

17 BY MR. VAN CAMP:

18 Q Well, are you aware of any tests that determine  
19 whether the biofilter to the -- I'm sorry, the wetland  
20 to the east of the biofilter adds silt to the flow  
21 leaving it or takes silt out?

22 A No, I am not aware of any study of that sort.

23 Q Are you aware of any studies that determine whether  
24 the wetland to the east of the biofilter adds or  
25 subtracts copper to water south of Stream C?

JOHN COLEMAN - CROSS

1 A No, I am not.

2 Q Are you aware of any tests that determine whether  
3 or not the biofilter adds or subtracts zinc to the water  
4 south of Copper Park Lane?

5 A I think you asked if the biofilter add or subtract  
6 and I would say yes.

7 Q I'm sorry, let me look at my question.

8 A The biofilter was designed to remove copper and  
9 other things from the stormwater.

10 Q Right. I misspoke in my question. Are you aware  
11 of any tests that determine whether or not the wetland  
12 that's to the east of the biofilter adds or subtracts  
13 zinc to the water south of Copper Park Lane?

14 A I am not.

15 Q You indicated that on at least two occasions you  
16 walked Stream C from Copper Park Lane to the Flambeau  
17 River; correct?

18 A Large portions of it, yes.

19 Q When you say *large portions of it*, why don't you  
20 tell us what portions you didn't walk.

21 A Well, I walked on one occasion, walked the entire  
22 length. I think that was the trip with the DNR, we  
23 walked the entire length of Stream C. On another trip,  
24 we walked substantial portions of the stream but were  
25 not on the stream bank the entire time. So at times we

JOHN COLEMAN - CROSS

1 were maybe 30, 40, 50 -- 30 or 40 feet away from the  
2 stream.

3 Q You indicated that on one of those occasions there  
4 were portions of Stream C that didn't have any flow.

5 A The flow appeared to disappear into the gravel for  
6 short periods of -- short distances, distances of maybe  
7 five or ten feet, yes.

8 Q Okay. And in those -- on those or that occasion  
9 that you saw that, you would agree that the water  
10 infiltrated into the ground at those locations.

11 A You're asking a question that's -- stream hydrology  
12 is very complicated with exchange between streambed and  
13 stream quite complicated. Infiltration to -- usually  
14 means something more substantial than very temporary  
15 exchange with the gravels. I would -- I would not  
16 necessarily call it infiltration of the stream at that  
17 point and I think that implies maybe a deeper  
18 infiltration than what I observed, which seemed to be  
19 rather shallow into the gravels.

20 But yes, I would say it infiltrated into the  
21 gravels in the streambed. Exactly how far it  
22 infiltrated it's hard to know, but it re-emerged after  
23 the gravel portions of the stream, yes.

24 Q Okay. In those instances when it infiltrated,  
25 we'll say into the gravel as you suggest, it was below

JOHN COLEMAN - CROSS

1 grade; correct?

2 A That is correct, yes.

3 Q So there wasn't surface flow at that location?

4 A There was not.

5 Q And you've indicated that that hydrology is very  
6 complicated; correct?

7 A That can be with water flowing in and out of the  
8 streambed gravel, yes.

9 Q Are you aware of anyone that has done a study to  
10 determine whether or not water from the biofilter passed  
11 those locations or did that infiltrate into the soil as  
12 well?

13 MS. MCGILLIVAY: Objection, Your Honor. It's  
14 calling for expert opinion that this witness has not  
15 prepared definitive --

16 THE COURT: Sustained.

17 MR. VAN CAMP: I'll accept that.

18 THE COURT: Yes.

19 MR. VAN CAMP: No, I meant that he doesn't. My  
20 apologies, Your Honor.

21 BY MR. VAN CAMP:

22 Q Are you aware of any studies that have been done  
23 about that?

24 A Can you describe -- I'm a little puzzled on what  
25 you're describing. Can you describe the scenario you're

JOHN COLEMAN - CROSS

1 talking about?

2 Q I am asking you if in your studies about Stream C  
3 you have come across any studies related to the  
4 phenomenon where water seems to go into the ground in  
5 Stream C. Have you seen any studies about that?

6 A No. This earlier study from 2005 I think talked  
7 about some aspects of the flow of Stream C, but the  
8 details of that I can't recall at this point. I think  
9 that was trying to do a general characterization of  
10 Stream C, so that would be the only work that I know of  
11 and I think it was rather cursory.

12 Q I'd like to -- if we could, please, take a look at  
13 Exhibit 74. I believe you indicated that Exhibit 74 is  
14 a photograph that you took. Which direction are you  
15 facing?

16 A I'm facing to the north/northwest.

17 Q There was a suggestion in a question you were asked  
18 as to whether or not this photograph shows the biofilter  
19 outlet. It does not show the biofilter outlet, does it?

20 A It does not.

21 Q It does show, however, grasses and other plants  
22 surrounding the biofilter?

23 A That is correct.

24 Q And grasses and plants continue around to the right  
25 side of this photograph and on the swale of the other

JOHN COLEMAN - CROSS

1 part of the biofilter; correct?

2 A I want to be careful. The use of the term swale is  
3 maybe --

4 Q I'm sorry.

5 A You mean the outlet?

6 Q No, I'm sorry. You're correct. Let me restate the  
7 question. The grasses that appear in Exhibit 74  
8 continue around the berm is what I meant, not the swale,  
9 but the berm as it continues around off to the right of  
10 this --

11 A Yes.

12 Q -- photograph. And this photograph I believe you  
13 indicated was taken in June; correct?

14 A Yes.

15 Q How tall do those grasses get later in the year?

16 A Oh, my guess is about twice the current height.  
17 But I didn't measure them. But, yes.

18 Q So what is the current height in Exhibit 74?

19 A Well, my guess is, you know, maybe average height  
20 of ten inches.

21 Q Are you standing on Copper Park Lane when you took  
22 Exhibit 74?

23 A I'm standing at the edge on the slope coming down  
24 from Copper Park Lane.

25 Q You're standing below the berm outside the  
JOHN COLEMAN - CROSS

1 biofilter; correct?

2 A Well, I think I'm actually a little bit elevated  
3 above. My feet are below the berm, yes.

4 Q And when you say you're *elevated above*, what are  
5 you elevated --

6 A Obviously from my photograph I had to be high  
7 enough to see the water. If my head was lower than the  
8 top of the berm, I wouldn't be able to see the water  
9 here. So I think I was probably up on the bank of  
10 Copper Park Lane to give me a little bit of vantage to  
11 see the biofilter.

12 Q Would you say that Exhibit 74 exhibits the height  
13 of the berm around the biofilter?

14 A I don't think that's the maximum height, but on the  
15 right-hand side there that's getting probably close. I  
16 think that is close to the southeast corner of the  
17 biofilter, but I think it -- and the berm is a little  
18 bit higher off to the right of the photo.

19 Q So how high is the berm that we're looking at in  
20 74?

21 A You know, I'd be reluctant to hazard a guess based  
22 on memory and the photo. I think you can probably make  
23 as good a guess as I can.

24 Q So you don't know.

25 A I'll say it's more than four feet and less than  
JOHN COLEMAN - CROSS

1 ten.

2 Q Okay. And in the area where the outlet is, it's  
3 lower than the berm pictured here; correct?

4 A The elevation of the outlet is just about the  
5 elevation of the water, so yes, the elevation of the  
6 outlet is lower than the berm height here.

7 Q How high is the height of the biofilter outlet  
8 above the grassy slope to the east of the outlet?

9 A Once again you'd be asking me to speculate. I  
10 would say more than three feet and less than six.

11 Q Okay. Could we take a look then at Exhibit 76, if  
12 you don't mind. Exhibit 76 is also a photograph that  
13 you took; correct?

14 A Yes.

15 Q And I believe it was taken on the same day as  
16 Exhibit 74?

17 A Yes.

18 Q Which direction are you facing in Exhibit 76?

19 A Facing to the east, a little bit to the north.

20 Q Now are you standing on the top of the biofilter?

21 A I'm --

22 Q On the biofilter berm?

23 A No. I'm standing in the outlet on a couple of  
24 these rocks that you can see in the photograph.

25 Q How far from the north corner of the biofilter are  
JOHN COLEMAN - CROSS



1 you when you take the photograph that's Exhibit 76?

2 A How far from the northeast corner?

3 Q Correct.

4 A Maybe 40/50 feet. But again, you're asking me to  
5 recall a distance from quite a few years ago. But I  
6 think if you really want to know the distance, I think  
7 the map would show you better than my recollection from  
8 2004.

9 Q Okay. Now I believe you indicated that you thought  
10 that Stream C, as you described it, flowed through the  
11 grass in this photograph.

12 A Yes.

13 Q Is that correct?

14 A Yes. That is correct.

15 Q How far away do you believe that is?

16 MS. MCGILLIVAY: Objection. Vague.

17 Q Okay. How far is it from the water that we see in  
18 Exhibit 76 to the place where you believe Stream C would  
19 be?

20 A I think very approximately about ten feet.

21 Q Okay. So if we were to look at Exhibit 1024 and we  
22 looked at the scale in Exhibit 1024, from the lip of the  
23 biofilter -- from the lip of the highest point?

24 A Okay. The highest point? Yes.

25 Q Of the outlet.

JOHN COLEMAN - CROSS

1 A Yes.

2 Q From the highest point of the outlet to the lowest  
3 part of the wetland to the east, how many feet are we  
4 talking about?

5 A I'd say 40 or 50 feet.

6 Q So in your declaration when you referred to Stream  
7 C being ten feet away from the biofilter outlet --

8 A Yes.

9 Q -- you're basically saying that the biofilter  
10 outlet is 40 or 50 feet wide; correct?

11 A No. I'm saying it's 30 to 40 feet.

12 Q So you are saying that the biofilter outlet, which  
13 you've said is three to six feet high, has a biofilter  
14 outlet that is 30 or 40 feet wide?

15 A It's a very gradual slope going out. Yes, I would  
16 say it's something like that.

17 Q And all of that slope is covered with rock?

18 A Well, you can see in the photographs there's some  
19 rock. There's now some mixed dead vegetation in there.  
20 There's probably soil underneath that, yes.

21 Q So at the point that we are looking at Exhibit 76,  
22 and there is water there, how far is that water that we  
23 see in Exhibit 76 from the highest point of the  
24 biofilter outlet?

25 A I'd say 20/25 feet. 20 feet my guess.

JOHN COLEMAN - CROSS

1 Q And as I look at this photograph, I don't see any  
2 flow.

3 A Well, I think it would be very difficult to see.  
4 I've tried -- it's almost impossible to get a still  
5 photograph of flow. I've gone to video camera, a video  
6 camera for exactly that reason.

7 Q Could we take a look, please, at Exhibit 76 -- I'm  
8 sorry, at 80.

9 MS. MCGILLIVAY: I'm sorry, I didn't hear you.

10 MR. VAN CAMP: I'm sorry. Exhibit 80.

11 Q When you testified about Exhibit 80, I believe you  
12 said you were standing on rocks in the biofilter?

13 A Yeah. I think that is the case, yes.

14 Q So you are standing on a rock in the biofilter when  
15 you're taking this photograph?

16 A Yes.

17 Q Which way are you facing?

18 A In this photo I'm facing east/northeast. The  
19 biofilter would be to the left of this picture.

20 Q Okay. So then if we look at Exhibit 81, please.  
21 Sorry about this. Are you simply turning around and  
22 taking a photograph a different direction than you were  
23 when you were at Exhibit 80?

24 A Pretty close to that. I think I may have moved a  
25 very small amount, but essentially I'm just doing kind

JOHN COLEMAN - CROSS

1 of a panorama here.

2 Q Okay. So you testified that Exhibit 81 showed the,  
3 I think, northeast corner of the biofilter in the upper  
4 left-hand corner; correct?

5 A In this photo?

6 Q Yes.

7 A Yes.

8 Q And do you see any water flowing in Exhibit 81?

9 A As I said, you can't see flowing water in still  
10 photographs. I saw flowing water when I was at the  
11 site.

12 Q Well, you would agree that the water in the upper  
13 left-hand corner is not flowing, it is in the biofilter;  
14 correct?

15 A Well, it's mostly still water, but water moves even  
16 when it's in a pond or in a lake, so it may be moving.  
17 It's not the sort of thing you could hope to detect in a  
18 photograph and if it's -- in this upper left-hand corner  
19 you wouldn't be able to detect that by sight either.  
20 But when it passes past my feet where I was standing, I  
21 could see water moving through the outlet.

22 Q So to see water moving through that outlet, you had  
23 to be actually standing right where you are; correct?

24 A I don't know if I had to be standing right where I  
25 was to see any movement. I mean in some of the earlier  
JOHN COLEMAN - CROSS

1 photos you can see the vegetation is bent because of the  
2 flow of the water. There's been dead vegetation that's  
3 been moved by flowing water. But I took the photo from  
4 this location because I thought it -- particularly  
5 because the grass was starting to obscure things, that  
6 it was important to be close to the outlet to get a good  
7 picture, so I stood right there. Whether I could have  
8 seen flow if I was back another 10/20 feet, at this  
9 point it would be speculation, I think, on my part.

10 Q Do you see in photograph 81 any of the bent-over  
11 grass?

12 A No, I don't. I saw it in one of the earlier  
13 photos.

14 Q From the point that your camera is focused on in  
15 Exhibit 81, it would be downhill over the edge of the  
16 biofilter outlet; correct?

17 A Downhill would be to the bottom right? Is that --

18 Q Right.

19 A Yes.

20 Q Correct?

21 A That is correct.

22 Q Do you have any photograph showing water flowing  
23 down that area?

24 A The previous photographs were of that area.

25 Q Could we go back to 76, please. Where is the slope  
JOHN COLEMAN - CROSS

1 that you referred to on the biofilter outlet in Exhibit  
2 76?

3 A This is the outlet sloping from the left-hand side  
4 of the photograph to the right-hand side of the  
5 photograph.

6 Q You also referenced a channel to the east of the  
7 biofilter outlet. Do you have any photographs to show  
8 that channel?

9 A No, I do not.

10 Q That's because it's a grassy swale; correct?

11 A The grass was tall enough that you really couldn't  
12 see the topography of the ground at this point. I mean  
13 there is a photograph here that shows that area, but the  
14 grass is tall enough that I'm not going to try to  
15 convince people that they can see something that's very  
16 difficult to see with the grass being 10 or 12 inches  
17 tall here.

18 THE COURT: We'll take our lunch break now.  
19 We'll resume at 1:30.

20 (Noon recess 12:30 p.m.)

21

22 \* \* \* \* \*

23

24

25

JOHN COLEMAN - CROSS

1 I, LYNETTE SWENSON, Certified Realtime and Merit  
2 Reporter in and for the State of Wisconsin, certify that  
3 the foregoing is a true and accurate record of the  
4 proceedings held on the 21st day of May 2012 before the  
5 Honorable Barbara B. Crabb, District Judge for the  
6 Western District of Wisconsin, in my presence and  
7 reduced to writing in accordance with my stenographic  
8 notes made at said time and place.  
9 Dated this 7th day of September 2012.

10  
11  
12  
13 /s/\_\_\_\_\_

14 Lynette Swenson, RMR, CRR, CBC  
15 Federal Court Reporter  
16  
17

18 The foregoing certification of this transcript does not  
19 apply to any reproduction of the same by any means  
20 unless under the direct control and/or direction of the  
21 certifying reporter.  
22  
23  
24  
25